VOLUME XLIV NUMBER 1

Massachusetts Law Quarterly

APRIL, 1959

(For Complete Table of Contents see Page 1)

SAVE THE DATES

JUNE 12, 13, 14, 1959
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MOUNT KISCO, NEW YORK

Massachusetts Law Quarterly

Volume XLIV **April, 1959** **Number 1**

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CONTINUING EDUCATION OF THE BAR

NOTICE OF PROGRAM OF INSTRUCTION FOR LAWYERS JULY 20-31, 1959

Applications are still being received for registration in the Harvard Law School Program of Instruction for Lawyers to be held at the Law School from July 20 to July 31, 1959. The Program is open to any member of the bar whether or not he is an alumnus of Harvard Law School. Dormitory accommodations and meals will be available in University buildings.

All of the courses will be given by members of the Harvard Law School Faculty.

ANTITRUST PROBLEMS IN MERGERS AND DISTRIBUTION (seminar)—DONALD F. TURNER, *Professor of Law.*

COMPARISON OF AMERICAN AND SOVIET LAW—HAROLD J. BERMAN, *Professor of Law.*

*CURRENT PROBLEMS IN SECURITIES REGULATION (seminar)—LOUIS LOSS, *Professor of Law.*

THE DRAFTING AND INTERPRETATION OF STATUTES—ALBERT M. SACKS, *Professor of Law.*

ESTATE PLANNING—A. JAMES CASNER, *Professor of Law.*

INCOME TAXATION AND CORPORATE ENTERPRISE—ERNEST J. BROWN, *Professor of Law.*

INTERRELATIONS OF STATE AND FEDERAL LAW—HENRY M. HART, JR., CHARLES STEBBINS FAIRCHILD, *Professor of Law.*

JURISPRUDENCE—AN INTRODUCTION TO LEGAL PHILOSOPHY—LON L. FULLER, *Carter Professor of General Jurisprudence.*

LABOR LAW—ARCHIBALD COX, *Royall Professor of Law.*

PROTECTION UNDER INTERNATIONAL LAW OF AMERICANS AND THEIR PROPERTY ABROAD (seminar)—RICHARD R. BAXTER, *Professor of Law.*

*TAX ASPECTS OF REAL ESTATE TRANSACTIONS—DAVID WESTFALL, *Professor of Law.*

TAXATION OF INTERNATIONAL TRADE AND INVESTMENT—STANLEY S. SURREY, JEREMIAH SMITH, JR., *Professor of Law.*

For a catalogue and application material, write to:

WILLIAM L. BRUCE, *Associate Director*
Program of Instruction for Lawyers
Harvard Law School
Cambridge 38, Massachusetts

* Applications for these seminars are no longer being accepted as they are oversubscribed.

THE CENTENNIAL ANNIVERSARY OF THE SUPERIOR COURT AND THE JOINT RESOLUTION OF CONGRESS RELATING THERETO

This year Massachusetts makes a noteworthy contribution to the national observance of a dedicated day by the celebration of the creation in 1859 of the Superior Court which, for one hundred years, has illustrated and applied in practice the principle of "Liberty Under Law." In recognition of this fact on March 23, 1959 the Congress of the United States adopted the following Joint Resolution, which was introduced in the House by Hon. John W. McCormack and in the Senate by Senators Leverett Saltonstall and John F. Kennedy.

It is a happy circumstance that "Law Day" proclaimed by the president of the United States as dedicated to the principle of "Liberty Under Law" for national observance should coincide with "Loyalty Day" dedicated by the Massachusetts Legislature by Chapter 263 of the Acts of 1949 under which the Governor, annually, issues a proclamation "setting apart May first as 'Loyalty Day'—in recognition of the blessings of freedom—secured to the people of the United States by their constitutional form of government and preserved and maintained by the unselfish service and sacrifice of her people."

86TH CONGRESS 1ST SESSION
H. CON. RES. 109

IN THE HOUSE OF REPRESENTATIVES
March 23, 1959

Mr. MCCORMACK submitted the following concurrent resolution; which was considered and agreed to

---

CONCURRENT RESOLUTION

Whereas July 2, 1959, marks the one hundredth anniversary of the existence of the Superior Court of Massachusetts; and

Whereas the open and impartial administration of justice is the firmest bulwark of a free society; and

Whereas the Superior Court of Massachusetts, throughout its long and distinguished history, has functioned in harmony with the highest ideals of American judicial procedure; and

Whereas, in these critical times, when justice is made a mockery in so much of the world, it is of the utmost importance that we in America cherish and preserve our legal heritage: Now, therefore, be it

Resolved by the House of Representatives (the Senate concurring), That the Congress extend its greetings and felicitations to the Commonwealth of Massachusetts upon the occasion of the one hundredth anniversary of the establishment and existence of the Superior Court of Massachusetts, and expresses the appreciation of the American people for its outstanding leadership in the never-ending struggle to achieve the ideal of liberty and justice for all.

REPORT OF MIDWINTER MEETING

The Midwinter meeting of the Massachusetts Bar Association was held at the Roger Smith Hotel at Holyoke on February 13 and 14, 1959.

Members of the Association have already received an outline of the program.

Lectures and seminars held on Friday afternoon, Saturday morning and Saturday afternoon, were well attended.

It was estimated that approximately 400 persons attended part or all of the meeting. Dr. Robert Tuby who lectured on "Medical Aspects of Litigation" on Friday afternoon proved to have outstanding drawing power. Usually this first conference is very sparsely attended, but in this case, nearly 150 persons attended the first lecture.

Socially the meeting was a definite success. Nearly 200 persons attended the smorgasbord on Friday night, and many stayed for the entertainment and dancing that followed; 250 persons attended the banquet on Saturday night at which Chief Justice Dethmers of the Michigan Supreme Court was the main speaker.

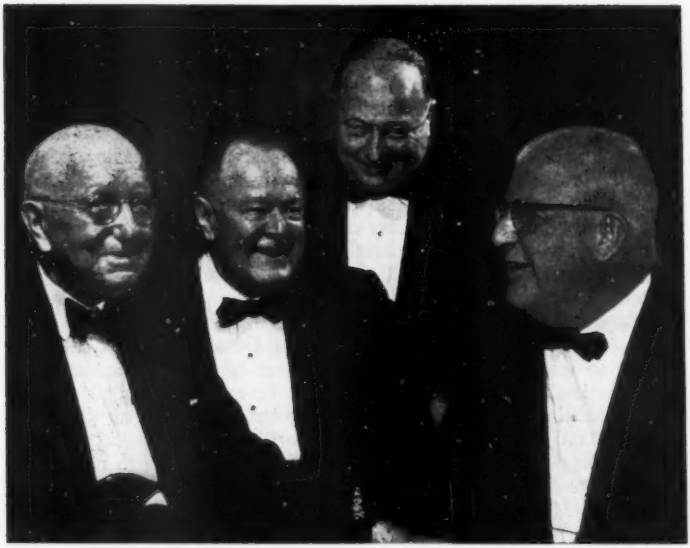
Saturday noon at an informal luncheon at the hotel, the Massachusetts Bar Association Service Award was presented to Kirby S. Baker, former Assistant Register of the Hampden County Probate Court. While this was going on the ladies were being entertained by a luncheon at the Log Cabin which was followed by a tour of Westover.

MILTON J. DONOVAN, *Chairman*

(For the Award of the Association Medal, See Opposite Page)

CHOICE OF LAW FOR INTERPRETATION OF WRITTEN INSTRUMENTS

An article on this subject appeared in the "Quarterly" for October 1958. Another discussion has just appeared in the Harvard Law Review for April 1959, pp. 1154-1165.



JUDGE COLLINS, JUDGE HUDSON, JUDGE NOONAN, PRESIDENT BARRETT

AWARD OF THE MASSACHUSETTS BAR ASSOCIATION MEDAL

At the dinner, President Barrett presented the medal to Walter L. Collins, retired Justice of the Superior Court of Massachusetts from 1928 to 1958, as follows.

In 1764 James Otis wrote that in this world people cannot live without contests, that someone is needed to arbitrate them and "the necessity of an impartial judge makes all men seek one."

In 1780 the Massachusetts Constitution in the 29th Article of the Bill of Rights provided that every citizen has a right to be tried by judges "as free, impartial and independent as the lot of humanity will admit." Since 1780 we have had many of such judges.

In these troubled days when many people are too busy or distracted to reflect and fully appreciate their blessings they may not realize that, in a trial court, it is not only the case or the parties that are tried.

In every case civil or criminal day after day and year after year the judge is on trial before himself and before his community and the judicial standards of the 29th Article of the Bill of Rights.

We are preparing to observe with appropriate ceremonies the 100th anniversary of the Superior Court. An illustration of the reasons for this celebration of the trial branch of our judicial system is the fact that a member of that court has met the professional tests of his judicial position for thirty years, with the respect and affection of the bar. As a token of that respect and affection, as President of the Massachusetts Bar Association, it is my privilege, by the authority of the Executive Committee, to present to you the Gold Medal of the Association for 1959.

Judge Collins—the Commonwealth of Massachusetts is indebted to you!

RAYMOND F. BARRETT, President

LEGAL DEFINITION OF INSANITY IN CRIMINAL CASES

In the last issue (No. 4 of Vol. XLIII for December-January) we printed the reports of the Judicial Council and of the Special Commission on Capital Punishment with differing drafts of a "definition" of legal "insanity" in criminal cases, and discussion of the different views. It was pointed out that, in spite of constant statements to the contrary in press headlines and other press columns the so-called "McNaughten rules" have never been the law of Massachusetts. After considering the Commission report and that of the Judicial Council, it is reported as we go to press that the Judiciary Committee has submitted a definition, now pending, which provides that, "a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks capacity to know the nature or quality of his act, or to know or appreciate that it is wrong, or to refrain from committing it." The terms "mental disease or defect" . . . do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

The bill appears to contain other provisions suggested in the 33rd report of the Judicial Council for 1957. While the proposed definition does not, in our opinion, change the substance of the Massachusetts law, it may stop the constant and mistaken statements that the McNaughten rules are the law of Massachusetts. F. W. G.

TWO NEW STATUTES RELATING TO MARKETABILITY OF LAND TITLES

CHAPTER 68. TO PROTECT LAND TITLES FROM CERTAIN CLAIMS FOR DOWER OR CURTESY.

SECTION 1. Chapter 189 of the General Laws is hereby amended by adding after section 15 the following section: *Section 16.* After the expiration of a period of ten years from the recording of any conveyance no spouse of any party making the conveyance shall make any claim to dower or curtesy in the land conveyed unless within such period the spouse has recorded in the registry of deeds for the county or district where the land lies a notice identifying the conveyance and the place in the public records of its recording and stating that dower or curtesy may be claimed in the land thereby conveyed. A reference to such notice shall be noted on the margin of the record of the conveyance.

SECTION 2. The provisions of section sixteen of chapter one hundred and eighty-nine of the General Laws, inserted by section one of this act, shall apply to conveyances recorded prior to the effective date of this act as well as those recorded thereafter; provided, however, that as to any conveyance recorded prior to said effective date the period for recording notice that dower or curtesy may be claimed in the land thereby conveyed shall not expire prior to January first, nineteen hundred and sixty-one. Approved February 24, 1959.

CHAPTER 105. RELATIVE TO PROCEDURE FOR THE FORECLOSURE OF MORTGAGES UNDER THE SOLDIERS' AND SAILORS' RELIEF ACT. *(Declared an Emergency Act by the Governor in effect March 20, 1959)*

Now in Effect

SECTION 1. The form of notice in section 1 of chapter 57 of the acts of 1943 is hereby amended by striking out the salutation or greeting and inserting in place thereof the following:

To (insert the names of all defendants named in the bill) *and to all persons entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended:*

SECTION 2. Said section 1 of said chapter 57 is hereby further amended by adding at the end the following paragraph:

In proceedings under this section, no person who is not entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended, with respect to the mortgage, trust deed or other security described in the bill whether named as a defendant in the bill or not shall be entitled to appear or be heard in such proceeding except on behalf of a person so entitled, or unless an affidavit by the claimant, or a certificate by counsel appearing for him, stating that he is in the service and thus entitled to the benefit of the act, is filed with the appearances. Such proceedings shall be limited to

the issues of the existence of such persons and their rights, if any. Approved March 9, 1959 and declared an Emergency Act on March 20, 1959.

NOTE

The petition and draft for this act was printed for the advance information of the bench and bar in the "Quarterly" for December and January with an explanation of its history and purpose as follows:

THE PURPOSE OF STATE PROCEDURE

In State Realty Co. v. McNeil Bros. Co., 334 Mass. 294, at pp. 298-99 the court said:

> "We do not doubt the power and duty of equity courts in this Commonwealth to protect the service-man to the full extent required by Federal law, but we think it was the purpose of the State statutes hereinbefore cited to provide means of furnishing that protection without the abandonment of the simple methods of foreclosure in common operation and the substitution of long drawn out and expensive procedures to which we were not accustomed."

This last sentence states the purpose of Chapter 105.

THE PETITION STATED

> "The undersigned citizen of Boston respectfully petitions for the passage of the accompanying bill or for legislation to avoid unnecessary delay and expense in procedure to ascertain and protect the interest of persons entitled to the benefits of the 'Soldiers' and Sailors' Civil Relief Act' in a bill in equity for leave to foreclose a mortgage."

The question has been asked—to what extent does the act apply to cases already entered? The answer seems to be that, if a claimant appears who is not entitled to the benefits of the act, the court before taking any action should ascertain that fact and dismiss the claim without prejudice to the claimant's right to start a separate proceeding in equity if he has grounds for so doing as if there were no Soldiers' and Sailors' Act. The new act does not bar or affect in any way such a proceeding. It merely provides limited procedure for the special limited purposes of the Federal act. F. W. G.

A BOOK NOTICE

"The Ugly American," by William J. Lederer and Eugene Burdick, W. W. Norton & Co., New York, 285 pp. $3.95.

We have just finished reading this book. We respectfully suggest that you read it through from cover to cover. As it has been on the "best seller" list for some time it is probably available in most libraries. F. W. G.

ADMINISTRATIVE DISCHARGE OR RELEASE OF FEDERAL TAX LIENS

To the Editor:

I enclose an article relative to administrative discharges of property from federal tax liens pursuant to Section 6325(b)(2) of the Internal Revenue Code of 1954. It is recommended that the article be published in the Massachusetts Law Quarterly so that members of the Bar may be informed of the availability of this procedure.

ANTHONY JULIAN
United States Attorney

Administrative Discharge or Release of Property Subject to Federal Tax Liens

The tremendous increase in the number of foreclosure suits in which the United States must be named a party, pursuant to Section 2410, Title 28, United States Code, in order to eliminate the federal tax lien, has caused much concern to the members of the Bar as well as officials of the Government. Section 6325(b)(2) of the Internal Revenue Code of 1954 was enacted for the purpose of avoiding in many of these actions the necessity of naming the United States as a defendant, thus minimizing the expenditure of both time and money in such actions. This Section permits the Secretary of the Treasury, or his delegate, to issue a certificate of discharge of any part of the property subject to the federal tax lien (1) if there is paid to the Secretary, or his delegate, an amount not less than the value of the Government's interest in the property, or (2) if the Secretary, or his delegate, determines the interest of the Government has no value.

The benefits to be gained by obtaining an administrative discharge instead of naming the United States as defendant in a foreclosure action are readily apparent. If the lien is discharged administratively:

(a) The mortgagee may resort to the terms of the mortgage to foreclose or may follow state procedures, without strict compliance with the judicial sales requirement of Section 2410.

(b) The one-year right of redemption provided for the United States after a foreclosure sale is eliminated. This right of redemption frequently deters bidders and reduces in amount any bid which is submitted.

(c) There will not be any future litigation, by appeal or otherwise, with respect to the federal tax lien and the property involved.

The form for applying for discharge of property from federal tax liens may be obtained from the local office of the District Director of Internal Revenue. While at first glance the form may appear long and involved, the information required should be in the possession of the attorney before he could bring a foreclosure suit.

The procedure established by Section 6325(b)(2) is not available once a foreclosure suit has been commenced or there has been a sale pursuant to a foreclosure. This is because once a suit is commenced the jurisdiction over the subject matter is acquired by the Attorney General. Although a few discharges have been issued after the commencement of a suit, it has been done only with the approval of the Attorney General. To obtain this approval necessarily requires additional time which is not involved if the discharge is requested prior to the institution of the foreclosure proceedings.

MORE HOPE ABOUT FEDERAL LIENS

THE REPORT OF THE A.B.A. COMMITTEE (139 PAGES)
WITH DRAFT OF LEGISLATION AND TECHNICAL EXPLANATIONS

"The unanticipated demand for copies of the interim Report which this Committee presented to the House of Delegates at the 1958 Annual Meeting in Los Angeles quickly exhausted the available supply. In view of the surprisingly widespread interest in the subject matter, in this its Final Report the Committee has again undertaken to explain, in considerable detail, the current status of the law respecting federal liens, and to present an analysis of the difficult problems and disturbing uncertainties the current law creates for the business and financial community. The Committee hopes that, by making available to interested persons—in a compact, relatively non-technical (we hope) document—the references, source materials, and practical considerations essential to sound legislative solution of the important, complex problems which have arisen in this field in recent years, it will facilitate appreciation and understanding of the importance of early consideration by the Congress of remedial legislation. This Final Report also contains, of course, the Committee's final conclusions and recommendations, with detailed technical explanation of the draft legislation it has developed."

Note: Extra copies of this Final Report may be obtained, at the Association's printing cost of $1.00 per copy, from:

AMERICAN BAR ASSOCIATION
1155 EAST 60TH STREET
CHICAGO, ILLINOIS

A QUESTION AND A WARNING — LIMITED ZONING VARIANCES

by

KENNETH B. BOND *of the Boston Bar*

Arthur Vendor owned a house in a district zoned for two-family houses. During the war, because of the housing shortage, he obtained a variance for five years to allow him to install a third housekeeping apartment on the third floor of his house. Four years later he sold his house to Bradley Vendee, who inquired at Town Hall and was told that the third apartment was permitted by the Board of Appeals. So Mr. Vendee figures that he could afford to buy the property, counting on the rent from two apartments. After living in his new house a year, he was notified that he must reconvert to a two-family house. This was a bitter blow. He could not meet the mortgage payments with the rent from only one tenant. Whose fault was it that he got into this difficulty?

Aaron Vendor owned and lived in a large house in a single family dwelling zone, but under a variance he was allowed to convert it into a two-family house on condition that the owner live in one of the two apartments. Some years later he decided to move to Florida, and sold his house to Bennett Vendee for investment property. Mr. Vendee's title examiner thought he was being very cautious when he telephoned to Town Hall and was assured that a variance had been granted, but was not told about the condition. Mr. Vendor had not misrepresented the situation. Has Mr. Vendee any remedy?

Would it be possible for the Board of Appeals, when granting a variance limited as to time, or subject to a condition to be performed by the owner, to impose a further condition that the appellant record a caveat or notice in the Registry of Deeds stating that a limited or conditional variance has been granted and referring to the appropriate Town office where the terms of the variance are on file? Or would legislation *requiring* such a notice to be recorded be advisable? I would like to have the Quarterly print your comments or those of your readers on the foregoing.

There can be no doubt that a Board of Appeals has the authority to limit a variance or to make it conditional on the appellant complying with specified regulations. See G.L.C. 40-A, Sec. 15, last sentence (Stat. 1954, C. 368).

KENNETH B. BOND.

ONE ANSWER

Why not? If the condition can be imposed notice to purchasers or others seems obviously, not only possible, but an essential requirement of fairness, to prevent foreseeable results such as those described. Why is there any need of legislation? F. W. G.

MEDICAL-LEGAL STATEMENT OF PRINCIPLES

(As approved by the Councils of the Massachusetts Medical Society and the Boston Bar Association and the Executive Committee of the Massachusetts Bar Association.)

By CHARLES W. BARTLETT

Within the past few years, the medical and legal professions have become more aware of the advantages to be gained by the promotion of better relations between the two professions. This has resulted in the adoption of so-called Statements of Principles by Bar Associations and Medical Societies in various parts of the country.

The result locally was the appointment of committees by the President of the Massachusetts Medical Society, and the Presidents of the Boston and Massachusetts Bar Associations. After independent study, this quite naturally resulted in the formation and functioning of a joint committee of doctors and lawyers representing all three.

Their deliberations at the outset were based on Statements that had been adopted elsewhere. Their goal was one which would outline the general framework for doctor-lawyer relationships and implement it without the vice of being too specific in an effort to cover all contingencies. The Statement that was agreed upon by the Joint Committee was in no wise a reprint of any previously adopted. It incorporated what the members of the committee believed to be the best features of the others adapted to local conditions in the Commonwealth. The final version agreed on by the Joint Committee was submitted to, and approved by, the Councils of the Massachusetts Medical Society and the Boston Bar Association and the Executive Committee of the Massachusetts Bar Association. It is now in effect.

The members of the Joint Conference Committee called for by the statement have been appointed by the Presidents of the Medical Society and the two Bar Associations. They are:

On behalf of the Massachusetts Medical Society

CHARLES C. LUND, M.D.
PETER W. SWEETSER, M.D.
JOHN J. TODD, M.D.
MAXWELL E. MACDONALD, M.D.

On behalf of the Massachusetts Bar Association

RAYMOND F. BARRETT, *Esquire*
THOMAS M. A. HIGGINS, *Esquire*

On behalf of the Boston Bar Association

CHARLES W. BARTLETT, *Esquire*
ROGER B. COULTER, *Esquire*

At the organizational meeting, Charles C. Lund, M.D., was elected Chairman and Thomas M. A. Higgins, Esquire, Secretary.

Correspondence with the committee should be addressed to Mr. Higgins at his office, 8 Merrimack Street, Lowell, or through the Secretaries of the Medical Society and the two Bar Associations.

The text of the statement is as follows:

STATEMENT OF PRINCIPLES GOVERNING CERTAIN PHYSICIAN-LAWYER RELATIONSHIPS

Whereas, physicians and lawyers are members of professions, dedicated to the furnishing of professional skill and service to the public; and

Whereas, a part of the practice of both professions is concerned with medico-legal problems connected with, or arising out of, injuries to, or illness or disability of, members of the public, and

Whereas, certain problems frequently arise in each profession in connection with these medico-legal problems affecting the relationship between the physician and the lawyer, the physician and his patient, and the lawyer and his client, and

Whereas, it is the duty of the lawyer to present all available and reliable medical testimony to support his client's claim and it is the duty of the physician to co-operate by attending court, and testifying in regard to the care, treatment and condition of the patient; and

Whereas, the public interest, the interest of the physicians and their patients, and the interests of the lawyers and their clients, will best be served by an understanding on the part of each profession of the function, scope, rights, duties, and responsibilities of the other profession in connection with such medico-legal problems, and by the co-operation of the members of both professions in the solution of such problems;

Now, therefore, the following Statement of Principles is hereby adopted by the Massachusetts Medical Society, the Massachusetts Bar Association and the Boston Bar Association.

1. Each profession recognizes that practitioners in the other profession have qualified for their particular licenses and practice by specialized training, and by demonstration of the necessary character and integrity, for the service of members of the public.

2. Each profession recognizes that the training, knowledge, skill, advice, and time of the members of the other profession are the means by which such members earn their livelihood, and that the most efficient and effective use of such talents in dealing with any problem involved in, or arising out of, the physician-lawyer relationship requires a due regard and proper consideration for the function, scope, rights, duties and responsibilities of the other profession with respect to such problems.

A. Report to Be Furnished by the Physician

1. *Authorization of Patient Required.*

A physician shall not furnish to any person, and a lawyer shall not request of a physician, any information concerning the history,

physical condition, diagnosis or prognosis of the physician's patient except upon the signed authorization of the patient (or, in the case of a minor, of the minor's parent or guardian). This principle shall not affect the giving of written medical reports by a physician to the Industrial Accident Board, where such physician has performed an impartial examination for said Board under the provisions of G. L. C. 152, s. 9; and provided, further, that this section shall not be construed to contravene s. 20A of C. 152.

2. *Reports to Patient or His Attorney.*

The patient, or his attorney, shall be entitled, upon written request, to a prompt report from the attending physician concerning the history, findings, treatment rendered, diagnosis and prognosis. The physician's fee for such report should be commensurate with the time and effort devoted to its preparation.

3. *Request for Report.*

When a medical report is requested of a physician, whether he be an attending physician, consulting physician, or examining physician, the lawyer requesting the report should make clear in his request the specific information desired; should disability evaluation and the prognosis be desired, the lawyer should so specify. The physician, upon receipt of such request accompanied by such authorization as may be necessary, should furnish the requested report promptly.

4. *Examinations of Adverse Party or Employee.*

Where there has been an examination of an adverse party, the examining physician shall not furnish to the person examined or his attorney or anyone else other than the person arranging for the examination a copy of his report or any information concerning his findings on such examination. The physician for the person examined may be present at the examination of his patient. The lawyer's privilege to be present, if the patient so desires, during history taking, will be recognized. The lawyer's presence during a physical examination must be dependent upon the patient's wishes and the discretion of the physicians concerned. The place of examination in a personal injury case shall be that place agreeable to the patient and considered suitable for the examination by the two physicians involved.

B. Physicians Called as Witnesses in Legal Proceedings: Preparation and Arrangements for the Giving of Testimony: Witness Fees

1. *Conference Before Trial.*

In order that the patient and client may have his case properly presented to the Court or other tribunal and to see that justice is done, it is the duty of each profession to present fairly and adequately the medical evidence in legal controversies. To arrive at

that end pre-trial conference between the lawyer and the physician regarding medical testimony is encouraged and recommended. The members of each profession shall do their utmost to cooperate with the other in arranging a time and place satisfactory to both for such a meeting.

2. *Subpoena for Physician: Conference.*

A subpoena should not be issued to any physician without prior conference with such physician concerning the matters regarding which he is to be interrogated, unless the physician and the lawyer agree that such conference is unnecessary, or unless the physician refuses to confer.

3. *Cooperation with Court.*

It is recognized that the proper and efficient dispatch of the business of the courts cannot depend upon the convenience of litigants, the lawyers or the witnesses, including physicians who may be called to testify; both the lawyer and the physician should recognize, accept and discharge their obligation to aid and cooperate with the courts in the presentation of medical testimony.

4. *Arrangement for Court Appearance.*

In arranging for the attendance of a physician at a trial or other legal proceeding, the lawyer should always have due regard and consideration for the professional demands upon the physician's time, and accordingly, the lawyer should, whenever possible, give the physician reasonable notice in advance of his intention to call the physician as a witness, and of the probable date on which the physician will be expected to testify; and the lawyer should also advise the physician to bring with him to court such records as the lawyer or the physician may need for the proper presentation of the physician's testimony. Furthermore, during the course of the trial the lawyer should endeavor to keep the physician advised from time to time as to the approximate hour when he will be called to the witness stand; and upon the physician's appearance at the hearing at the hour agreed upon the lawyer should endeavor to arrange with the court for the prompt calling of the physician to the witness stand.

5. *Fees for Expert Testimony.*

A reasonable expert witness fee is a proper and necessary item of expense in litigation involving medical questions; and when a physician is called to testify as an expert witness he should be paid such expert witness fee as may be agreed upon between the physician and the lawyer calling him; and in every instance in which the lawyer makes arrangements for expert testimony it shall be the duty of the lawyer to see that adequate arrangements for the payment of such expert witness fee have been made with the person or persons responsible for the payment therefor.

6. *Contingent Fees.*

Neither the physician called as a witness nor the lawyer so calling him shall invite or enter into any arrangement whereby the making of a charge for the physician's appearance as a witness or for the giving of testimony, or the amount of any such charge, shall be contingent on the outcome of the litigation or on the amount of damages awarded in the case.

7. *Physician Called as Witness.*

The attorney and the physician should treat one another with dignity and respect in the courtroom. The physician should testify solely as to the medical facts in the case and should frankly state his medical opinion. He should never be an advocate and should realize that his testimony is intended to enlighten rather than to impress or prejudice the court or the jury.

It is improper for the attorney to abuse a medical witness or to seek to influence his medical opinion. Established rules of evidence afford ample opportunity to test the qualifications, competence and credibility of a medical witness; and it is always improper and unnecessary for the attorney to embarrass or harass the physician.

C. Settlements

Payment of Physician's Services out of Proceeds of Settlement.

It is recognized that the charges of a physician are due when a statement has been rendered to the patient. Upon settlement of any claim wherein services rendered by a physician are involved, the lawyer shall forthwith notify the physician of such settlement and upon the receipt of the physician's bill and an order from the patient to pay the same direct to the physician, the attorney shall use every reasonable effort to see that the physician's bill is paid forthwith, and the attorney shall make no charge to the physician for any services rendered in connection therewith.

D. Joint Conference Committee

A Joint Conference Committee, composed of four physicians and four lawyers, shall be appointed annually. The four physicians shall be appointed by the President of the Massachusetts Medical Society. Two lawyers shall be appointed by the President of the Massachusetts Bar Association and two by the President of the Boston Bar Association. The Joint Conference Committee shall select its own Chairman from among the Committee's members; such chairmanship shall alternate annually between the medical members and the legal members.

The purposes of the Committee shall be

A. Promotion and perpetuation of harmony between the professions;

B. Achieving a fuller understanding of mutual problems;

C. Consideration of legislation affecting the medical and legal professions;

D. Hearing of grievances;

E. Reference of grievances to the Medical Society or the Bar Association concerned where the Committee deems such reference warranted.

E. General Provisions

Nothing contained in this Statement of Principles is intended to be inconsistent with the rules of law.

THE PENDING ISSUE OF ANOTHER CONSTITUTIONAL CONVENTION

THE GOVERNOR'S PENDING BILL—SENATE, No. 517

(For Discussion, see pp. 21-29)

SENATE, March 12, 1959.

The committee on Constitutional Law, to whom was referred so much of the Governor's Address (Senate, No. 1) as relates to the calling of a constitutional convention (page 4); recommitted petition (accompanied by bill, Senate, No. 67) of William C. Madden for legislation to ascertain the will of the people relative to the calling and holding of a constitutional convention; and the petition (accompanied by bill, House, No. 1469) of Charles Robert Doyle for legislation to ascertain and carry out the will of the people relative to the calling and holding of a constitutional convention, report the accompanying Bill (Senate, No. 517). [Representatives Rider of Needham, Hamilton of Worcester and Line of West Springfield dissent.] For the committee,

RICHARD R. CAPLES.

AN ACT TO ASCERTAIN AND CARRY OUT THE WILL OF THE PEOPLE RELATIVE TO THE CALLING AND HOLDING OF A CONSTITUTIONAL CONVENTION.

SECTION 1. For the purpose of ascertaining the will of the people of the commonwealth with reference to the calling and holding of a constitutional convention, the secretary of the commonwealth shall cause to be placed on the official ballot to be used at the biennial state election in the year nineteen hundred and sixty the following question:—"Shall there be a convention to revise, alter or amend the constitution of the commonwealth?" The votes upon said question shall be received, sorted, counted, declared and transmitted to the secretary of the commonwealth, laid before the governor and council, and by them opened and examined, in accordance with the laws

relating to votes for state officers so far as they are applicable. The governor shall, by public proclamation, on or before the first Wednesday in January in the year following said state election make known the result by declaring the number of votes in the affirmative and the number in the negative; and if it shall appear that a majority of said votes is in the affirmative, it shall be deemed and taken to be the will of the people that a convention be called and held to revise, alter or amend the constitution, and in his proclamation the governor shall call upon the people to elect delegates to the convention, at a special election to be held in all the cities and towns of the commonwealth on the first Tuesday in May in the year nineteen hundred and sixty-one.

SECTION 2. The number of delegates to be elected to the convention shall be three hundred and twenty, of whom twenty-four shall be elected at large, fifty-six by the fourteen congressional districts, to wit, four by each district, and two hundred and forty by the legislative representative districts of the commonwealth, each district having the same number of delegates as it is then entitled to elect representatives to the general court.

SECTION 3. Nomination of candidates for the office of delegate to the constitutional convention shall be made by nomination papers without party or political designation which shall be signed in the aggregate by not less than twelve hundred voters for each candidate at large, by not less than five hundred voters for each candidate for delegate from a congressional district, and by not less than one hundred voters for each candidate for delegate from a legislative representative district. Said papers shall be filed on or before five o'clock in the afternoon on the first Tuesday in March in the year nineteen hundred and sixty-one. No person shall be a candidate for delegate in more than one district, or both in a district and at large. If nomination papers for more than one nomination for delegate are filed in behalf of a candidate, and if, within seventy-two hours after five o'clock in the afternoon of the first Tuesday in March aforesaid, he withdraws all but one nomination, the remaining nomination shall be valid. No person shall be a candidate for delegate from a legislative representative district in which he does not reside.

SECTION 4. If in the commonwealth at large, or in any district, the number of persons nominated by nomination papers equals or exceeds three times the number to be elected delegates as provided by section two, a non-partisan primary shall be held in the commonwealth, or in such district, on the first Tuesday of April in the year nineteen hundred and sixty-one. At such primary, twice the number of persons to be elected delegates shall be chosen from those nominated by nomination papers, and those so chosen shall be deemed nominated as candidates for delegates, and their names only shall appear on the ballot at said special election. The provisions of section five of this act shall, so far as is consistent herewith, apply to the primaries provided for by this section.

SECTION 5. At the special election to be held under the provisions of section one, every person then entitled to vote for state officers shall have the right to vote for twenty-four delegates at large, for four delegates from his congressional district, and for the number of delegates from his representative district to which that district is entitled under the provisions of section two. The number of delegates of each class for which the voter has the right to vote shall appear on the official ballot. No party or political designation shall appear on said ballot.

SECTION 6. The persons elected delegates shall meet in convention in the state house, in Boston, on the first Wednesday in June in the year nineteen hundred and sixty-one. They shall be the judges of the returns and election of their own members, and may adjourn from time to time; and one hundred and sixty-one of the persons elected shall constitute a quorum for the transaction of business. They shall be called to order by the governor, and shall proceed to organize themselves in convention, by choosing a president and such other officers and such committees as they may deem expedient, and by establishing rules of procedures; and when organized, they may take into consideration the propriety and expediency of revising the present constitution of the commonwealth, or making alterations or amendments thereof. Any such revision, alterations or amendments, when made and adopted by the said convention, shall be submitted to the people for their ratification and adoption, in such manner as the convention shall direct; and if ratified and adopted by the people in the manner directed by the convention, the constitution shall be deemed and taken to be revised, altered or amended accordingly; and if not so ratified and adopted the present constitution shall be and remain the constitution of the commonwealth.

SECTION 7. The convention shall be provided by the sergeant-at-arms, at the expense of the commonwealth, with suitable quarters and facilities for exercising its functions. It shall establish the compensation of its officers and members, which shall not exceed twenty-five hundred dollars for each member of the convention as such. It shall, subject to the approval of the governor and council, provide for such other expenses of its session as it shall deem expedient, and may cause to be prepared and issued a statement briefly setting forth such arguments as the convention may see fit relative to any revision, alteration or amendment of the constitution adopted by it, or any part thereof. The members of the convention shall receive for travel, lodging and meals the amount specified in the second paragraph of section nine B of chapter three of the General Laws, as appearing in section one of chapter two hundred and sixty-three of the acts of nineteen hundred and fifty-three, for members of the general court. The governor, with the advice and consent of the council, is authorized to draw his warrant on the treasury for any of the foregoing expenses.

SECTION 8. The secretary of the commonwealth is hereby directed

to transmit forthwith printed copies of this act to the selectmen of each town and the mayor of each city within the commonwealth; and whenever the governor shall issue his proclamation, calling upon the people to elect delegates, the secretary shall also, immediately thereafter, transmit printed copies of said proclamation, attested by him, to the selectmen and mayors.

SECTION 9. All laws relating to nominations and nomination papers, and to primaries, elections and corrupt practices therein, shall, so far as is consistent herewith, apply to the nomination of candidates for delegates to the convention and to the primaries and special election provided for by this act.

DISCUSSION

I wonder how many citizens of Massachusetts realize that there is now pending before the legislature for action at the present session, a bill proposed by the Governor and reported by the Committee on Constitutional Law *with three dissents* calling for another constitutional convention. I also wonder how many people who may have heard of the bill have thought seriously about what it means. Nobody knows, but at the two hearings which I attended before the committee, there were two or three (one representing the Governor) appearing in favor and about the same number opposed, who included representatives of the Chamber of Commerce and of the Associated Industries. I understand that the Massachusetts Civic League has also expressed its opposition. And yet, the bill presents the most serious fundamental question before the people of Massachusetts involving, as it does, the possible overhauling of the entire constitutional history of Massachusetts since 1780. Certainly the proposal deserves more discussion than it has received so far.

In order to provoke such discussion the part of the Governor's inaugural relating to the matter was reprinted in the "Quarterly" for December 1958-January 1959 followed by a statement of my reasons for opposing the bill which I submitted to the committee at the hearings. We are glad to have the opportunity to present in this issue another discussion by Mr. Mahoney in support of the bill in the hope of stimulating others to think.

For those who may not have read the discussion in the last "Quarterly" I reprint my introductory paragraphs as follows.

> "The calling of another convention is a very grave proposal which should make the bar and the public generally begin to think about it.
>
> "It is in no captious or disrespectful spirit that I submit my belief that it is not only inadvisable but that it involves gravely dangerous possibilities (not, I think, generally realized) of weakening, rather than strengthening the government of the Commonwealth.

"I think, as a citizen representing no one, that I should state my reasons and experience on which my judgment is based, for what it is worth.

"I happen to have been intimately connected, not only with the study of our constitutional history before and since the last convention, for more than fifty years, but I sat in the gallery and listened to the debates at almost every session of the last convention during the summers of 1917 and 1918 and the short session of 3 or 4 days in August 1919. I write, therefore, from personal observation and discussion and personal participation in controversies and litigation arising from results of that convention. I also compiled, through a news clipping bureau (and read as it appeared) the story of the convention as it appeared in the newspapers throughout the Commonwealth. That collection of news items, editorial and cartoons in 24 large scrap books is now on deposit in the Massachusetts Historical Society. They contain a good deal of information which does not appear in any official volumes."

As Mr. Mahoney's article refers to passages in my discussion in the "Quarterly" for December-January, I suggest that both articles will be better understood if the four pages, VII to X in that issue, are read.

F. W. GRINNELL

THE CASE FOR A POPULAR CONSTITUTIONAL CONVENTION

By

CHARLES FRANCIS MAHONEY,
Commissioner of Administration

The first recommendation contained in the Inaugural Address of His Excellency, Foster Furcolo, Governor of the Commonwealth, was for the calling of a popular Constitutional Convention—that recommendation appeared under the general heading entitled "Government Operations and Reform."

The citizens of Massachusetts are indebted to the MASSACHUSETTS LAW QUARTERLY and to its distinguished Editor-in-Chief, Frank W. Grinnell, a learned student of Massachusetts' constitutional history, for his efforts to enliven public interest and understanding in the Governor's far-reaching recommendation.

While it is not my purpose in this article to discuss the many legal issues involved in any amendment of the Massachusetts Constitution through the several processes available, it should be recognized that there appears to be little foundation to the contention of some that a Popular Constitutional Convention would be illegal. The Constitution itself, while silent on the subject of the calling of a convention to revise, alter or amend the fundamental law of the Commonwealth,

has several important provisions which are of not only historical interest but also of legal relevance. These provisions are:

(1) Preamble. The end of the institution, maintenance, and administration of government, is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it, with the power of enjoying in safety and tranquility their natural rights, and the blessings of life: And whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.

(2) Part the First. Declaration of Rights. Article VII. Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family or Class of men: Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.

The first two provisions, written in 1779, mark the Massachusetts Constitution as a product of the American political experience of the late 18th Century. The year 1779 was, after all, in the midst of the Revolutionary War. It was in the tradition of the declaration of the early colonies proclaiming the doctrine that governments were "instituted among men, deriving their just powers from the consent of the governed." It was less than a decade before those colonies were to meet in Philadelphia for what is often referred to as *the* Constitutional Convention.

It is a well established rule of constitutional interpretation that the document should be interpreted "in the light of the conditions under which it and its several parts were framed, the ends it was designed to accomplish, the benefits it was expected to confer and the evils it was hoped to remedy."[1]

I submit that the convention method was so instinctive to the constitutional fathers of Massachusetts and of the United States that the omission of a specific provision for other conventions is not so significant as opponents of constitutional conventions have claimed.[2]

In 1776, two years after the Massachusetts colonial charter had been virtually abolished by acts of Parliament, the House of Representatives had requested that the towns vote whether or not the two branches of the General Court should go into joint convention to frame a constitution, after which the document would be published for the "perusal and inspection" of the towns and then ratified by the Assembly. A majority of the towns which did vote agreed to this procedure, but less than half the towns voted at all. There was opposition to the proposal from some towns on the grounds that a specially elected, broad-franchise constitutional convention should be called

[1] See *Tax Commissioner* v. *Putnam*, 227 Mass. 522, 524.

[2] Of the twelve states with no constitutional provision, ten have held at least one convention since the drafting of their fundamental laws.

instead. In the next year the General Court recommended that the towns instruct their regular representatives with regard to the drafting of a constitution, and despite the opposition from many areas went into convention on June 17, 1777. On February 28, 1778, it submitted a constitution to the people. Much opposition was organized, the most famous expression being the *Essex Result*, which detailed what was to its writers the defect of the proposed fundamental law. The people in their vote rejected the draft constitution.

This rejection of the constitution of 1778 has been viewed as a repudiation of the method by which the General Court had "resolved itself" into convention instead of calling a special body as Concord and others had urged. While there is a legal and theoretical argument that *all* constitutional conventions are "revolutionary" bodies and that there is no "constitutional" way of calling the people together under one form of government for the purpose of altering that very governmental structure, Massachusetts practice and precedents refute that view for this state at least. Nevertheless it is clear from Massachusetts history that the method of 1778, the General Court acting as a constitutional convention, is not the proper way of creating a convention.

In recording its objections to the 1778 draft constitution, the town of Beverly, after listing substantive defects in the document, wrote the following passage, which goes a step beyond the more famous Concord proposal and indeed has striking similarities to the Jefferson letter to Samuel Kercheval of thirty-eight years later:

> . . . We cannot dismiss it without observing the want of an article we think any constitution that is confirmed and ratified by the people ought to contain. We mean one, by which it shall be provided that on a certain day in the year 1798 or such time as may be judged best, a Convention chosen by the people at large, distinct from the General Court, shall be held, to determine on such amendment, alteration, addition, or erasement, as should be found just; such innovations to have the sanction of the people; and that after other [*sic*] twenty years the constitution shall again be taken up in the same manner, as so on successively. This, if any known method can, might in time perfect a constitution and secure it inviolate.[3]

The calling of a popular constitutional convention in Massachusetts is within a great legal, philosophical and historical tradition. Properly viewed, a constitutional convention serves as a great creative and corrective force in the lives and history of democratic peoples.

In his recent article, Mr. Grinnell states that the calling of a constitutional convention "is not only inadvisable, but that it involves gravely dangerous possibilities (not, I think, generally realized) of weakening, rather than strengthening the government of the Commonwealth." He cites several reasons for this belief:

1. ". . . It is gambling with our constitutional foundations on the uncertainties of the election of a large body of men who would

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[3] Massachusetts State Archives, Vol. 156.

supposedly, but not necessarily, be wiser and better informed than our legislators.

2. ". . . There were special reasons for each of the earlier conventions.

3. ". . . There are special dangers today which were less serious at the time of the earlier conventions when the population was much smaller and with fewer distractions.

4. ". . . It was not until 1949 that the Legislature required the teaching of Massachusetts history in our high schools with the result, discovered during the Massachusetts Heritage Programs since 1954, that there is an appalling lack of knowledge and understanding of the history of our goverment and its reasons.

5. ". . . The Convention of 1917-18 submitted 19 constitutional amendments on the same ballot in 1918. They were all approved by a majority of those who voted on them but only by a minority of those who voted *on candidates* at the election.

6. ". . . Another serious element of danger—the danger of hurried thought with possible political complications. . ."

I do not share the pessimistic outlook expressed in the above observations nor the apparent abhorrence and distrust of contemporary popular government. Indeed, if, in Mr. Grinnell's words, "a constitutional convention is a gamble," I suggest that it would be only one installment of a gamble taken years ago when popular government was instituted among men.

A constitutional convention is a very special occasion in the life of a commonwealth, demanding in terms of personal services and hard work, all that the human resources of the commonwealth can provide. The opinion that men who served in earlier conventions were not always wiser than some of our legislators is not, as I view it, a persuasive argument. When one considers that we have had only four conventions as compared to 180 years of legislative experience, one would hope that Mr. Grinnell was correct!

On this point, however, I would seriously suggest that the advantages of a convention in this respect lie not only in the personal qualifications of the elected members, but also in the opportunity for expert advice from outside the convention through participation in convention committees and preparation of research materials for the use of the delegates. The work of preparatory commissions here and in other states provided notable service to those bodies. Work done for the direct and immediate purpose of a constitutional convention has the obvious advantage of a more intensive application to problems than results from the ordinary legislative process. The advocacy of a convention is not intended as an unfavorable reflection upon the Legislature, but merely to remind us of a lesson which the people of Massachusetts taught the government in the 1770's: that at times it is good to view our government responsibilities with broad perspective and then set out to solve the detailed problems with the best advice possible.

A review of the backgrounds and occupations of delegates to Massachusetts constitutional conventions in the years 1779-80, 1820-21, in 1853, and 1917-19 provides reassurance to those who express concern about the possible composition of a convention in this second half of the 20th Century. In 1779 only 19.4 per cent of the delegates were college graduates, while 39.7 per cent of the delegates in 1917 were college graduates. The changes in the economic life of the Commonwealth from the date of our first convention are reflected in these statistics:

In the 1779 Convention only 13.5 per cent of the delegates were businessmen and 10.7 per cent lawyers and judges, while 42.2 per cent were farmers. In the 1917 Convention 28.1 per cent of the delegates were businessmen, 49.1 per cent were lawyers and judges, and only 1.6 per cent of the delegates listed their occupations as farmers. In view of the vast changes in social and economic conditions and the greatly increased opportunities for public and higher education during the intervening years, I submit that we may have every confidence that delegates chosen to represent the people at a convention today would be better trained and equipped than at any earlier period in our history.

I have no reason to believe that life in this Commonwealth during the periods of our earlier conventions was without its own "distractions." While it is true that a variety of the products of technological achievement may compete today for man's attention, these same far-reaching innovations would make possible the communication of every word and act of a convention to every citizen within our borders. I am unaware of any commonly accepted political theory within a democratic framework which postulates that a greatly increased population should be accompanied by an inversely decreased right to participate in the affairs of government.

Regardless of the ill-advised method of submission of constitutional propositions used by the 1853 convention, it seems hardly a fair criticism of the work of that body that several of its farsighted proposals became amendments in the following years through the specific amendment procedure. On the contrary, in view of the complete failure of the standard amending process in the preceding 13 years, the long-range effect of that convention's deliberations is a tribute to the educative power of this method of constitutional amendment.

Similarly, I find Mr. Grinnell's criticisms of the Convention of 1917-19 insufficient to support his indictment of the convention method. It was a common mistake made in many elections of the period to place large numbers of issues on a ballot. Furthermore, that degree of voter participation in 1918 on the results of the Convention was the rule rather than the exception so far as Massachusetts history is concerned. The authors of a study made for the Commission to Compile Information and Data for Use of the Constitutional Convention concluded with a frankness which the facts then dictated and subsequently verified: "Except in 1853, the vote on constitutional amendments has consistently been much lower than

that for governor. . . A minority of the voters has apparently always decided constitutional changes in Massachusetts."[4]

The significant comparison of the convention method is with the product of the legislative amending process, not with an after the fact consideration of what would seem ideally to have been the correct solution to a constitutional problem. If, as is surely the case in some respects, particular amendments now themselves need change, we would be acting with a strange vindictiveness were we to reject a method of amendment which has played so important a role in Massachusetts history as has the constitutional convention.

I suggest that the late Governor Samuel W. McCall has provided the reassurance to those who may share the concern of Mr. Grinnell, that "another serious element of danger" is the danger of "hurried thought and resultant political complications." In his Address to the Legislature on January 6, 1916, Governor McCall said:

> ". . . Amendment through the instrumentality of a constitutional convention is essentially conservative. The Legislature would first pass a law submitting to a popular vote the question whether a convention should be held. After the people had voted in favor of the convention they would elect delegates who would assemble and consider the changes which in their judgment should be made. Those changes would again be submitted to the people and not become effective until ratified by them. There would thus be four steps in the process: action by the Legislature, the vote of the people, action by the convention, and finally, again a vote of the people. Such a deliberate procedure would be likely to enact into our organic law only such changes as would embody the settled opinion of the time."

Mr. Grinnell is surely correct when he says that there were special reasons for the calling of earlier conventions. In 1820 and 1853 serious problems of legislative representation were considered of sufficient importance to put the convention question to the people; in 1917 the great issue of the day, though by no means the only one, was the initiative and referendum. In each instance, however, the calling of a convention resulted in the serious and fruitful consideration of many different governmental questions facing the state in the particular generation concerned. If what is needed in Massachusetts is "reason and judgment," as Mr. Grinnell has stated, our history of constitutional conventions provides important, positive lessons and not merely procedural admonitions.

There exist compelling reasons for the immediate calling of a popular constitutional convention. His Excellency, Governor Foster Furcolo, has on several occasions recommended the convening of a convention. In his recent Inaugural Address he stated:

> "The Constitution provides the framework which governs and controls the operation of the State Government. The taxes that

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[4] "A Study of the Vote Upon Constitutional Amendments Submitted to the People of Massachusetts and of the Votes in the Constitutional Convention of 1853," Unpublished Data of the Commission (Boston 1917).

we pay, our industrial position in relation to other states, the relationships, between local units of government and the State Government, the organization and management of the affairs and functions of the State Government itself, and the qualification of voters are, in large measure, controlled and determined by Constitutional provisions established more than forty years ago.

"It is my belief that among the matters which should be considered at such a Convention are:

"1. The tax policies and tax structure of the Commonwealth, including the adoption of a graduated income tax.

"2. The reorganization of the Executive Branch of the government.

"3. The evaluation of the relationships and functions of local governmental units to the State Government.

"4. The establishment of a four-year term for Constitutional officers.

"5. The advisability of permitting necessary incentives for the growth and expansion of industry.

"6. The reduction of the voting age to eighteen."

The Governor has not suggested that the Convention be limited to the matters recited above. Surely a convention would consider the special problems posed by the vast growth of urban areas and the need for improved metropolitan government. Any consideration of the relationships and functions of local governmental units to the state government would provide an opportunity to evaluate the role of county government or to redefine its functions.

My experience in state government has convinced me that a complete reorganization of the Executive Branch of government is essential if we are to achieve a reduction in the cost of government and that efficiency in the management of public affairs which is demanded.

The Massachusetts Taxpayers Federation has stressed the need for the reorganization of the functions of the Executive Branch and the necessity of providing the Chief Executive of the Commonwealth with the effective tools with which to work.

> "It is entirely beyond the realm of possibility that a Chief Executive, no matter how competent and no matter how hard-working, can be sufficiently acquainted with the policies, programs and problems of 177 separate units to provide effective leadership and coordination of activities."[5]

The present provisions of the Massachusetts Constitution establishing 20 departments are totally inadequate to meet the demands of present-day state government service. I believe that only by a con-

[5] Organization of the Executive Branch of Massachusetts State Government . . . Massachusetts Taxpayers Federation.

stitutional convention can we immediately achieve that comprehensive reorganization that is so sorely required.

Our tax policies must be re-examined, as the Governor has repeatedly recommended, if we are to maintain our competitive economic position. In the forty years which have passed since our last convention, the state budget has increased by over four hundred million dollars and technological revolutions have carried us to the outer reaches of space. Public debt and public expenditure in relation to per capita income have undergone drastic revision between the wars and the depressions that have been experienced since the last convention. There is a great need for the people to determine anew what kinds of service they require from their government and how they propose to best pay for those services.

Many other states have held constitutional conventions since 1919 and have benefited by them. I have not, of course, been able in this brief statement to cover all of the problems surrounding the calling of a popular constitutional convention, nor has it been possible to set forth the many items which should be considered at such a convention.

Mr. Grinnell has sided with Burke in his opposition to the popular convention. With respect, I would call on Jefferson:

> "I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting our ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times."[6]

COMMENT BY F. W. G.

Thank you, Mr. Mahoney. Perhaps you and I have started some thinking about a matter that deserves more thinking and discussion.

There are a few comments which I should make to clarify our differences a little.

1. You speak of some people who think a convention would be illegal. I know of none and I am certainly *not* one of them so I approach the matter merely as one of judgment as to the wisdom of calling one. You are mistaken in your apparent suggestion of conflict between my quotation from Burke and yours from Jefferson.

I am a bit surprised at the suggestion that my remarks indicated a "pessimistic outlook" and "abhorence and distrust of contemporary popular government," when, as a matter of fact, I have been all my life a chronic optimist who believes that it is a daily miracle that we are not worse off than we are.

[6] Thomas Jefferson to Samuel Kercheval, July 12, 1816.

2. Demosthenes, the great Athenian in his second Philippic against the power of Philip of Macedon (several hundred years B.C.) warned the Athenians that the greatest safeguard of a democracy was "distrust" of power. That I had supposed was the basis of the old proverb that "Eternal vigilance is the price of liberty." I was also impressed some years ago by a statement of the late Dean Inge that "the influence of boredom on history is very much underestimated." During half a century of more or less active participation in "popular government," state and national, past and "current," I have observed what appears to be widespread "boredom" or indifference or "being too busy" or something, to think and act in regard to fundamental questions. This seems to me indicated also by the relatively small number of persons who vote *on questions* on a ballot.

3. As to "College graduates" in the various conventions, I happen to be a graduate myself and have listened to a great many others, but, again, I have not always been impressed with their common sense and judgment—in matters of government. I daresay they think the same way about me. Much common sense in our history has come from men who were not college men. There was an ancient idea, now happily discarded, that "a king can do no wrong," but, when one thinks it through, I think one finds that we did not get rid of a king when we got rid of King George Third: we substituted another one called King Majority and, as the "Founding Fathers" realized that, they provided for reasonable restraints by our Constitution *to protect ourselves against ourselves.*

Today reasonable *restraints,* individual or collective, judging from the newsstands, the screen, the radio, the newspaper reports, the car drivers and traffic accidents, and observation in general, do not seem noticeably popular.

As I see it our restrained constitutional popular government has emerged from controversy and must survive through controversy. Every political contest since the time of Demosthenes seems to have been based on expressed "distrust" of some people of power in other people. The human itch for power is strong in every form of government and it seems to be expressed in terms of abusive "distrust."

All these things enter into what I have called the "gamble" of uncertainty in a convention, having sat through and watched and listened to the last one *in action* from start to finish.

So we still disagree. It seems to me a question of judgment. His Excellency, the Governor, and you and a majority of the committee think there should be one. I agree with the dissenters and have expressed my reasons for thinking that it would be a mistake in judgment.

Now let us see how many others will take the trouble to think about it.

F. W. GRINNELL

WHY NOT MORE POLICE DOGS?

Extracts from a Recent Editorial.

"European police and now some American have been using trained dogs, not only to help officers seize suspects they may be trying to arrest but to detect malefactors whom police may not recognize.

"Major Andrew T. Aylward of the St. Louis police force, which added canine 'officers' four months ago, declared recently that a major crime has yet to be reported in dog-patrolled districts. He told of a test witnessed by his officers sent to London for courses in dog-handling in which a trained police dog passed up perhaps 8,000 persons and then pointed out a man with two marijuana cigarettes in his shirt pocket.

"Human memory, photographic plates, anthropological measurements, make your bow to—a dog's nose."

An article describing the remarkable success of dog patrols in London was printed in the "Quarterly" for June 1954 (Vol. 39, No. 2, pp. 15-18). The Nantucket whalers reduced crime in London in the 18th Century by providing sperm whale oil to light the streets. Why not try more dogs in the 20th Century? A trained officer with a devoted trained dog would seem to be needed in the present dangerous world to protect both the public and the police. Are we mistaken?

F. W. G.

"CRITICISM" OF THE SUPREME COURT AND PRESIDENT MALONE'S LETTER AS TO THE RESOLUTIONS OF THE AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES

FOREWORD

In the "Quarterly" for October 1958, in view of what seemed to us hasty, excessive and unfair criticism of the resolutions of the National Conference of Chief Justices in regard to "judicial self-restraint" at Los Angeles last August and the address of the Chairman Chief Justice Dethmers of Michigan in support of them, we printed the resolutions, the address of Chief Justice Dethmers and a substantial part of the report leading up to the resolutions. We did this under the general title, "The Constitutional Principle of Judicial Self Control," and discussed the matter. We pointed out that, regardless of headlines in the press, the Chief Justices' report was not "an attack on the Court," but as stated by the Chairman, was a professional expression of "concern with certain of the decisions." "It contains no applause for suggestions on the political front that the Court be stripped, by Congressional action, of any of its traditional powers—the Conference report would have none of that."

In February of this year resolutions were adopted by the A.B.A. House of Delegates. It should be clearly understood that only the resolutions (somewhat modified) were adopted by the House and

that the contents of the rest of the report contained merely the views of the members of the committee and were not adopted by the House.

The first resolution contains the most important statement on which not only the House, but the Committee were unanimous:

"that the American Bar Association disapprove proposals to limit any jurisdiction vested in the United States Supreme Court."

As the following letter of Mr. Schweppe throws light on the action of the House, we print it for preliminary reading. F. W. G.

CRITICISM OF THE SUPREME COURT

by

ALFRED J. SCHWEPPE *of Seattle*

So many people have asked me for the quotations which I used yesterday in Chicago before the House of Delegates of the American Bar Association during the debate on criticism of the United States Supreme Court in connection with the Report of the Committee on Communist Tactics that I reproduce them herewith:

Mr. Justice Brewer, in his Lincoln Day Address, 1898 (15 Nat. Corp. Rep. 848, 849) said:

"it is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but *better all sorts of criticism than no criticism at all.* The moving waters are full of life and health; only in the still waters is stagnation and death."

In *Bridges* v. *California*, 314 U. S. 252 (1941)—the Los Angeles Times contempt case—Mr. Justice Black, writing for the majority, said:

"*The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion.* For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."

In the same case Mr. Justice Frankfurter, though dissenting on other grounds, agreed with this basic concept in the following words:

"Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties and fallibilities. There have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. *Therefore judges must be kept mindful of their limitations and of their*

ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt."

And he then fortified his statement by quoting Mr. Justice Brewer's 1898 Lincoln Day Address as above quoted.

The late Mr. Justice Jackson, who rendered many valuable services as a member of the American Bar Association to the date of his untimely death, in his last book *The Supreme Court in the American System* (Harvard University Press, 1955) affirms the essentiality of professional criticism. See for example, the quotation reprinted in the February, 1958, issue of the *American Bar Association Journal*, page 189, in which he singles out "acceptance or criticism by the profession" as one of the important criteria in appraising a decision's "real weight in subsequent cases."

In his recent *"The Supreme Court From Taft to Warren"* (Louisiana State University Press, 1958), Mr. Alpheus Thomas Mason, biographer of Mr. Justice Stone, says:

> "The Justices themselves have been less anxious to black out knowledge of the Court's activity *than* are certain of its self-appointed protectors . . .
>
> "In 1930 Justice Stone was quite undisturbed by the close scrutiny the Senate gave Mr. Hughes' nomination. Stone regarded it as evidence of 'wholesome interest in what the Court was doing.' 'I have no patience,' the Justice commented, 'with the complaint that criticism of judicial action involves any lack of respect for the courts. *Where the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful* scrutiny of their action and fearless comment on it.' Stone was not horrified in 1937 when President Roosevelt went on his court-packing spree. Then, as in 1928, he believed that even the unjust attacks on the Court had left 'no scar,' that 'the only wounds from which it has suffered have been self-inflicted.' "

The severest critics of the Court's majorities over the years have been its dissenting members, whose rights and duties in this respect do not differ from those of any member of the bar or of the American public. Witness a recent vigorously critical dissenting statement signed by Mr. Justice Douglas, Mr. Justice Black, and Mr. Chief Justice Warren (*Yates* v. *United States*, 355 U. S. 66, 76, November, 1957):

> "This case is a shocking abuse of judicial authority. It is without precedent in the books."

ALFRED J. SCHWEPPE

A JUDGE'S REMARK ABOUT JUDGES

"While it may well be true that the highest office for a judge is to sit in judgment on other judges' errors, it is perhaps a more challenging task to seek, from minute to minute, to avoid one's own errors."

(From a Letter of Hon. Charles E. Wyzanski, Jr.)

RESOLUTIONS OF THE HOUSE OF DELEGATES

PRESIDENT MALONE REPLIES TO CONGRESSMAN CELLER'S STATEMENT

President Malone addressed the letter to Congressman Emanuel Celler (D-NY), chairman of the House of Representatives Judiciary Committee, after Celler was quoted as asserting in Washington that the House of Delegates action had "maligned" the Supreme Court and was "irresponsible."

Following is the full text of President Malone's letter to Representative Celler:

Dear Representative Celler:

Newspapers published today carried an article under a Washington, February 24, dateline quoting you as asserting on the House floor that the House of Delegates of the American Bar Association, in adopting the resolutions presented by the Special Committee on Communist Tactics, Strategy and Objectives, had "maligned" the Supreme Court and had taken action which was "irresponsible" and "most unseemly."

In view of the fact that the action of the House of Delegates was concluded in Chicago at approximately 12:00 o'clock, Noon, on February 24, I can only conclude that you spoke without having seen the texts of the resolutions or the statement of the Board of Governors transmitting the report to the House. I am accordingly enclosing, for your information, a copy of the resolutions as adopted by the House of Delegates as well as a copy of the statement of the Board of Governors.

I invite your attention to the first resolution adopted by the House of Delegates, which recites:

> "WHEREAS the Supreme Court of the United States and an independent judiciary created by the Constitution have been and are the ultimate guardians of the Bill of Rights and the protectors of our freedom, and as such it is the duty of the members of the Bar to defend the institutions of the judiciary from unfair and unjust attacks." . . .

I also invite your attention to the following statement of the Board of Governors, in the light of which the House of Delegates acted:

> "In making its recommendation for approval the Board does not in any way intend to indicate censure of the Supreme Court, nor an attack upon the independence of the judiciary. Indeed the obligation of the Bar to defend the Supreme Court as an institution is emphasized in the first resolution proposed by the Committee's report."

Finally, I wish to call your attention to the fact that the House, in adopting those resolutions, deleted from them proposed language which, it was pointed out, could have been misconstrued to indicate criticism of the Court.

The resolutions as adopted by the House of Delegates are consid-

ered, constructive statements, recommending legislative action which appears to the Association to be required to remedy deficiencies in certain internal security laws. The fact that these deficiencies were disclosed by court decisions does not make their proposed correction an attack upon the Supreme Court in any sense. Likewise, professional criticism of a court decision does not constitute or imply an attack upon the court which rendered the decision.

To state that in adopting these resolutions the Association was maligning the Supreme Court, is wholly unjustified and contrary to the expressed intent of the House of Delegates.

I feel confident that your examination of the resolutions will convince you that their purpose clearly was to suggest remedial legislation. Actually, the action of the House of Delegates was in fact a strong plea to the Congress to preserve the appellate authority of the Supreme Court and an independent judiciary. In taking this action, the House of Delegates reaffirmed the stand taken by the American Bar Association last year in strongly opposing legislation in the 85th Congress which, had it been enacted, would have seriously restricted the jurisdiction of the Court.

Very truly yours,

(Signed) ROSS L. MALONE,
President.

THE BOSTON CONFERENCE OF THE COMMITTEE OF THE AMERICAN BAR ASSOCIATION ON "WORLD PEACE THROUGH LAW"

The first regional conference of this Committee was held in Boston on April 27 and 28 beginning with a dinner on Good Friday evening attended by about fifty lawyers in the northeastern United States. Under the Chairmanship of Charles S. Rhyne of Washington, the 1958 president of the A.B.A., the Committee began its work which was foreshadowed at the London Meeting of the Association in 1957. As reported in the *Boston Sunday Globe* on March 29:—

Lawyers spent the day breaking ground for a new program of world law, with the emphasis on the present World Court at The Hague.

The meeting adjourned after closing remarks by Rhyne, who said, "We have to build this program brick by brick. We have laid the first bricks here in Boston.

"Establishing the law of the world is the job of the lawyers of the world. We lawyers have a new client; civilization itself."

Four more regional meetings are planned in Chicago, Charlotte, N. C., San Francisco and Dallas, followed by a series of conferences abroad. A worldwide meeting of lawyers by 1961 is the A.B.A.'s goal.

Boston Herald-Traveler.

President Raymond F. Barrett, Charles S. Rhyne, Chairman A.B.A. Committee World Peace Through Law, Richard Cardinal Cushing, Archbishop of Boston, and John R. Kelly, President New Jersey Bar Association.

An outstanding feature of the meeting was an address by Richard Cardinal Cushing. Beginning with the words:—

"The work on which you have ventured may well be the most significant of our times."

He continued . . . "It must be possible for men of good will to establish an international juridical order which will protect the legitimate claims of national patriotism, while at the same time it effectively removes the international tensions which breed discontent and lead to war."

Robert H. Reno of Concord, N. H., member of the A.B.A. Committee, said "We have been urged to stretch our minds, so to speak, in defining our concept of the application of international law. I feel that Cardinal Cushing stretched our minds considerably. It was an extraordinary speech."

We understand that the speech will be printed in full in the near future.

While doubtless many people will be doubtful about the possibilities of this movement it will be well for us to bear in mind that Dr. Einstein said "imagination is more important than knowledge," the poet Shelley described it as "the great instrument of moral good" and Napoleon said "the human race is governed by its imagination."

F. W. G.

ALICE IN NUCLEAR ENERGY LAND

Alice and the Red Queen

PART IV

"Well, in *our* country," said Alice, "you'd generally get to somewhere else—if you ran very fast for a long time, as we've been doing."

"A slow sort of country!" said the Queen. "Now, *here*, you see, it takes all the running *you* can do, to keep in the same place. If you want to get somewhere else, you must run at least twice as fast!"

(From *Through the Looking Glass*, by Lewis Carroll.)

RADIATION, "AN ENEMY OF THE PEOPLE"???

New Problems in Law and Legislation

and

The Trial of Thoonen v. Commonwealth of Australia

by

JAMES B. MULDOON, of the Boston Bar

FOREWORD

To the Lawyers and Judges of Massachusetts

If you read this article, you will perhaps, understand why we selected, as a frontispiece, the picture and the remarks of Alice and the Red Queen.

This is the 4th of a series of articles by Mr. Muldoon on the new conditions and dangers facing the world and the immediate resulting legal problems of life, injury, or death now facing the legal profession here and throughout the country. These articles have interested lawyers in Massachusetts, but, being unique pioneer legal studies at the beginning of an era which promises hazards as well as progress, their impact does not seem to have been felt by the profession as a whole.

From many quarters we have had inquiries concerning our determined effort to maintain the leadership we have always enjoyed at the bench and bar, by actively seeking to brief the profession on developments in the dynamic growth of the law.

We are gratified that this series has been discussed in several articles in law journals and legal periodicals, in other parts of the country. We are also pleased that the American Society of Planning Officials has invited Mr. Muldoon to participate in their convention in Minneapolis in May of this year, to discuss some of the questions raised in these pages.

Whether you have read the previous articles or not, we respectfully suggest that every judge and every lawyer in the Commonwealth might well profit by reading this report, since we feel it furnishes some valuable advance knowledge of what may suddenly present itself in the daily practice of law.

After a detailed account of current developments, Mr. Muldoon gives us a life-size report of the first outstanding trial of a radiation-personal injury case. This report, which will be concluded in our July issue, features top medical and other experts.

In asking the question: "Radiation—'An Enemy of the People'???" Mr. Muldoon asks the question as to how the terrible dangers and hazards of atomic energy can be minimized without checking the inevitable public need for the extensive use of atomic energy in ordinary life in the years to come.

The first article appeared in the "Quarterly" for December 1957; the second in March 1958; and the third in July 1958.

A good many people, including lawyers, have got to do some thinking.

F. W. G.

MR. MULDOON'S ARTICLE

A survey of the various mass media forms inflicted on the American public, which seek to amaze and amuse, with a bare minimum of information, seems to indicate that we *consumers* can look upon the atomic energy revolution as a wondrous cornucopia from which all wants will be filled. Some of the other concepts that have been successfully put across include a public acceptance of the fact that all this will call for enormous expense; that the various atomic structures and the "hardware" involved are interesting and impressive, but beyond the comprehension of all but Doctors of Philosophy; and that there is little or no risk of any danger of any kind from atomic energy or radio active materials in any form.

It might also be said that various reminders have been circulated that there is no time to lose in all this; and we had better watch out or Russia will "beat us."

The 1959 budget for the operations of the U. S. Atomic Energy Commission runs close to 2½ billion dollars, and by the spring of 1959 the privately owned utility companies (which have divided the nation into 26 administrative units for the purpose) will have spent between one quarter and one half billion for nuclear power development.

In addition to all this, suppliers of materials, equipment, and services (including all forms of advice) account for the expenditure of an additional astronomical sum.

"The atom is the power of the future," said Ralph Cordiner, "and power is the business of General Electric."[1]

Power may be the business of General Electric but Senator Clinton P. Anderson, Vice Chairman of the Congressional Joint Committee of Atomic Energy stated on December 16, 1958:

> "As a matter of national policy, I believe it is undesirable to permit the field of advanced atomic power concepts to be 'staked out' as the private domain of industry."[2]

There has been an attitude on the part of various public and private components of the atomic energy fraternity that this industry, and the A.E.C. itself, would better grow and prosper if the principle of "the least governed is the best governed" was the rule of the day. By the spring of 1959, it had become apparent that the monumental atom, like all other idols and images graven by man, had feet of clay.

Two important developments had taken place in the Congress. First: hearings were scheduled on the industrial radioactive waste disposal problem with a consideration of the possible effects of future quantities of radioactive wastes on Man and his environment;[3] and Second: hearings were scheduled on employee radiation hazards and workmen's compensation. These two factors should make it fairly plain to anyone that our consideration of the atomic energy revolution must include such things as sewage, public health hazards,

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1 "*Time*," a weekly news magazine, Jan. 12, 1959, p. 75.
2 Release No. 186, Joint Committee on Atomic Energy (JCAE) dated December 16, 1958.

and industrial accident Board proceedings to determine whether or not John Jones is or is not entitled to benefits under the workmen's compensation statutes.

"AN ENEMY OF THE PEOPLE?"

By April of 1959, the two congressional investigations had been completed and in the matter of atomic energy and its by-products, we seem to have then reached a point which corresponds with the picture presented in Henrik Ibsen's play: *"An Enemy of the People."*

In this drama of the bourgeois extant in a southern coastal town of Norway, in the 1880's, the fathers and doctors of the community had become involved in a controversy over the Municipal Baths. Peter Stockman, the mayor of the town, and the chairman of the Baths committee, is heard to proclaim the merits of the famous watering place, and the fact that because of the baths, a hitherto unknown prosperity had developed in the town. Taxes had been lightened and property values were rising.

Dr. Thomas Stockman, the brother of the mayor, and the Medical Officer of the Municipal Baths, who had previously recommended the excellent sanitary conditions present, had subsequently discovered some disturbing medical facts about this civic showplace, and stated that he intended to publish the information in the local newspaper. The Mayor decried this proposition and sought to persuade his brother to deal with the matter "through the proper channels," and "by the legally constituted authorities."

It was the doctor's position that the baths, "this main artery of the town's life blood"; this "nerve center of our town"; this municipal "pulsating heart" is actually a "pest-house." The "whole Bath establishment," said Dr. Stockman, "is a whited, poisoned, sepulcher . . . the gravest possible danger to the public health."

Dr. Stockman continued with an assertion that filthy poison oozes out on the shore, that cases of typhoid and "gastric" fever resulted, and that other dire consequences were inevitable.

As the drama unfolds it is made obvious to Dr. Stockman that because of the great expense in remedying the situation, the "legally constituted authorities" refuse to pay any attention to him, or to accept his evidence. He finds all doors closed to him; the newspapers refuse to publish his statement.

He then sets out to correct the evil without the assistance of the

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[3] One important aspect of man's environment is the problem of radioactive "fall-out." A rather disturbing situation has come to pass within recent months in regard to the importance of this "fall-out" on the health of man. The non-official *"Consumer Reports"* for March, 1959 at p. 102, pointed out that we depend on the federal agencies for our information on this problem. Citing a remark made in a Congressional Committee report in 1957 that "Information on fall-out has evidently not reached the public in adequate or understandable ways," *Consumer Reports*, informs us that it has begun its own program of sampling.

Consumer Reports paid particular attention to fresh milk, which is a pathway by which Strontium^{90} enters the human body. In Boston, for example, there is twice the average amount of Sr^{90} in the milk, as compared with other cities. This of course presents a problem which we cannot discuss at this point. "Here is a new problem in public health, a world-wide problem which neither man nor nature can wash away," says *Consumer Reports*.

No one should feel that *Consumer Reports* is more authoritative than the A.E.C., or the U. S. Public Health Service. But it does become more and more obvious that as far as safety and public health is concerned, the A.E.C.'s day is done.

better element, is resisted and defeated at every turn, and eventually, a formal vote is taken at a public meeting of the citizens by virtue of which Dr. Stockman is declared an "enemy of the people."

After due reflection on the controversies flowing from atomic energy, fall-out, waste-disposal, radiation danger, employee hazards, and the rest of it, we are convinced beyond a reasonable doubt that the analogy between the Dr. Stockman of 1880 (and the municipal baths), and the present development, growth and state of the atomic energy industry throughout the world in 1959, is a perfect one.

A modern Dr. Stockman has spoken out substituting "the atomic energy industry" for Ibsen's municipal baths, and "Radiation" for the "filthy poison" of an earlier day.

$R_{?} = ?$

"As a physician I find the possibility of wide-spread injury by radiation particularly disturbing, for we do not yet have effective means of combating radiation illness once it is established. The damage produced by radiation like that resulting from other physical agents is usually irreversible.

"This does not mean that patients with slight or moderate radiation damage are doomed, for the regenerative power of the human body is tremendous and much of the damage may be located in tissues that are constantly being replaced, such as the blood. The fact remains, however, that for the cells damaged, or destroyed by radiation, there can be no recovery. This makes radiation hazards particularly significant."

From: *"Radiation—A Major Public Health Problem* by Berwyn F. Mattison, M.D., F.A.P.H.A."[4]

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[4] American Journal of Public Health, Jan. 1958, p. 5.

There have been some significant recent developments in the field of public health and radiation. On the Federal level, it appears that the "ultimate authority" in protecting the public from radiation will be transferred to the U. S. Public Health Service. On March 26, 1959, Dr. Russell H. Morgan of Johns Hopkins, head of a 12-member government advisory group made this as his recommendation. Morgan's report said that it was "unwise to continue the assignment of authority over the public health aspects of atomic energy to the same agency that has a prime interest in the *promotional aspects* on the field."

The U. S. Public Health Service, which is an agency of the Department of Health, Education, and Welfare, and the Food and Drug Administration have both been recently active in the area of radiological surveys of air, water, food, and milk. The USPHS deals mainly with air, water, and milk, while the Food and Drug Administration deals with food in general.

The Food and Drug Administration has already filed a report dated October 15, 1958 to the effect that "compared to food samples produced prior to 1945, this survey shows that the great majority of post '45 samples do not carry significant burdens of radioactivity. Notable exceptions are certain *sea foods* (canned oysters and claims), dairy products (especially milk), and tea.

A division of Radiological Health was instituted in the Public Health Service and was given increased areas of responsibility in July 1958.

The A.E.C. on the other hand, under the chairmanship of Mr. McCone, seems to be about ready to make an orderly transfer of at least some of its authority over health and safety to the Public Health Service.

In Massachusetts, there seems to be no question whatsoever that the Massachusetts Atomic Energy Commission can not even begin, as presently constituted, to deal with any problems of health and safety. Several bills were filed in the 1959 Session involving matters of public health and a "Report on Regulatory and Protective Measures Pertaining to Radioactive Materials" (under the provisions of Chapter 94, Resolves of 1958) has been filed with recommended legislation. The Massachusetts Department of Public Health seems to be assuming a certain amount of expected leadership on the state level.

BE PREPARED

Motto of the Boy Scouts of America

Courtesy Tracerlab, Inc.

Above are two officers of the Waltham (Mass.) Fire Department inspecting radiation survey meters.

These instruments are used to survey surfaces exposed to radiation in order to determine the nature and extent of the radioactivity present. In addition, the same instruments are required to be used (by good practice) in order to monitor operations where persons are working with radioactive materials, such as radiography operations. The purpose in the latter case is to insure that no one receives an excessive dose of radiation. The type of instrument used depends on the (1) nature of the radiation (alpha, beta, or gamma); (2) the magnitude of the dosage rate; and (3) whether the problem is one of detection or one of measurement.

The portable "G-M" survey meter held by the fireman at the left in the picture is generally used to *detect* the presence of radiation and for general survey of personnel, clothing, protective equipment, tools, etc.

The "Cutie Pie," shown on the hood of the car above, is an instrument which is generally used to *measure* the amount of gamma radiation present. It is possible to manufacture this type of instrument so that other forms of radiation may be *measured* also.

In the "Report of the United Nations Scientific Committee on the Effects of Atomic Radiation" (1958),[5] it is said:

"Progress in experimental physics since the beginning of the twentieth century has also brought about new sources of radiation

[5] General Assembly Official Records; 13th Session, Supplement No. 17 (A/3838) New York, 1958.

such as man-made radioactivity and powerful accelerators. Following the discovery of nuclear fission in 1939 and its applications, radiation hazards and protection problems increased very extensively and the atomic explosions in Hiroshima and Nagasaki caused many human deaths from radiation. The contamination of the environment by explosions of nuclear weapons, the discharge of radioactive wastes arising from nuclear reactors, and the increasing use of X-rays and of radioisotopes for medical and industrial purposes extend the problem to whole populations and also raise new international questions. In 1955, the General Assembly of the United Nations decided to include in the agenda of its tenth session an item entitled "Effects of atomic radiations."

In the general conclusions reached by the U.N. Committee, at p. 43 of the report, it is stated:

> "Our knowledge of radiation and of its hazards is not however static; although still limited, it has been expanding rapidly. In recent years, considerable and sometimes spectacular advances have been made in our understanding of many of these matters. In the light of general scientific experience, the Committee confidently expects that continuing research on an increasing scale will furnish the knowledge urgently needed to master those risks which we know to be associated with the development and scope of the uses of nuclear energy for the welfare of mankind."

THE LAWYER AND THE ATOM

Having suggested that there are problems facing us as a result of atomic energy which can not be shrugged off by nuclear good-will ambassadors speaking at Rotary Club luncheons, we do not therefore request that the whole thing be given up. The atomic industry holds the future of mankind in the hollow of its hand.

There are no limits to the opportunities which this industrial revolution has brought to the profession of law. To mention a few fields which show definite promise of activity, we cite administrative law, patent law, tax law, public utility law, legislation, labor law, anti-trust law, workmen's compensation, insurance law, and last but certainly not least, the bread and butter practice of tort law with special emphasis on personal injury, wrongful death, and property damage.

Professor Leo A. Huard, of the Georgetown University Law Center, has taken pains to define the duties and responsibilities of the lawyer in the "Nuclear Age":

> "There is no reasonable excuse for a lawyer to remain uninformed about the status of the nuclear energy industry. It is gratifying to be able to say that, as a group, lawyers have taken sound measures to keep abreast of this second industrial revolu-

tion. Individually however, there are still too many of us who have failed to take advantage of the opportunities for education all about us." . . . .

In concluding his remarks, in this statement, Professor Huard says:

"Whether the role assigned to us as individual lawyers in this new industrial revolution be large or small, each one must remember that his greatest responsibility is the public interest. In an area where policy is still being formed and where statutes and rules are new and untried, the public interest becomes the lawyer's paramount professional interest. Due regard for the clients cause cannot be allowed to obscure the absolute necessity of protecting the interest of the public. The vast potential benefits of nuclear energy and its tremendous possibilities for harm do not admit of any other conclusion."[6]

"LAWYERS, LEGISLATORS, AND THE ATOM"

In an address to a regional meeting of the ABA in Pittsburgh on March 11, 1959, Senator Anderson, Chairman of the JCAE, spoke of "Lawyers, Legislators, and the Atom." The senator pointed out that until the Atomic Energy Act of 1954, the AEC had been acting in more or less a proprietary capacity.

As the 1954 Act opened the door to private ownership of reactors, and encouraged the wide use of radio-isotopes, "the AEC has been shifting gradually to a parallel role of regulator of private atomic development, particularly as to health and safety."

Senator Anderson indicated further that while the individual lawyer might see problems of third party liability and workmen's compensation, the bar associations might very well consider the legal policy problems and social implications of the development of atomic energy.

As Anderson pointed out in his speech, while most industries begin on the local level and become subject to federal regulation only when inter-state commerce is involved, atomic energy grew "upside down."

Said the Senator:

"Now it is becoming more a part of our peacetime economy, and local and state governments—traditionally the protectors of the health and safety of their citizens—are becoming involved."

There is still some question as to the proper role of the state and local governments in this field. Federal legislation is silent on the matter, but there is still the question of whether or not the Federal Government has "pre-empted the field."

[6] Vanderbilt Law Review, Vol. XII, No. 1, Dec. 1958, p. 1.

This theory is made patent by *California* v. *Zook*,[7] *336 U. S. 725;* and *Pennsylvania* v. *Nelson*,[8] *350 U. S. 497.* Several states (including Massachusetts)[9] have adopted an atomic energy coordination act; and in the case of Massachusetts, a radiation regulation code has also been adopted.[10]

The problem of State-Federal regulation of atomic energy activity, (and a problem which should attract the interest of lawyers in general) was clearly set forth by Senator Anderson as follows:

"Minnesota recently adopted regulations which raise the direct legal or constitutional question. The Minnesota regulations require that before someone constructs a reactor in that state, he must submit the plans of the reactor to the state health officer for examination. The state health officer may require additional plans and information, and may delay commencement of construction of the reactor. In addition, the regulations provide that the state health officer must give his express approval before the reactor can begin to operate on its nuclear fuel.

Could a reactor builder, who has already obtained a license from the Federal AEC, after a lengthy procedure, ignore the Minnesota health officers? Could he say: 'I have my Federal license, and I believe your regulations requiring me also to obtain a state license are invalid, and therefore I intend to build my reactor without regard to your regulations.' What if the reactor will be Federally owned as at Elk River, but operated by a co-operative like the Elk River Co-op with the conventional facilities owned by the co-op?[11]

A further question arises if, as in the case of Northern States Power Company, an atomic power plant is built in South Dakota just across the river from Minnesota, where the prevailing winds blow towards Minnesota and particularly *Minneapolis and St. Paul.*

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[7] *California* v. *Zook*, 336 U.S. 725 (1948). In this case the defendants were convicted of violating a California penal statute which made it criminal to sell transportation in a carrier which has failed to secure a permit from *either* the California Public Utilities Commission or the I. C. C. The defendants operated a "share the ride" travel agency which was an interstate operation made subject to I. C. C. regulation since 1942. The defendants were prosecuted by the State of California; they admitted their unlawful activity (since they had a license from neither the State of California nor the I. C. C.) but they moved to quash the criminal complaint on the grounds that the state statute "entered an exclusive congressional domain."

In the majority opinion Mr. Justice Murphy said that the question was whether or not Congress intended to override state laws identical with its own when it, through the I. C. C. regulated "share-the-ride" travel (which had been previously exempted). Tracing the legislative history, and noting that the statute itself was silent, the opinion notes that "normally congressional purpose to displace local laws must be clearly manifested."

In the majority opinion it was further noted that there was no apparent conflict between federal and state regulation.

Interestingly enough Murphy, J., noted that "It is difficult to believe that the I. C. C. intended to *deprive itself* of effective aid from local officers experienced in the kind of enforcement necessary to combat this evil *aid of particular importance in view of the I. C. C.'s small staff.*

(In this regard there is a definite parallel between the I. C. C. and A.E.C.)

Concluding his opinion, Mr. Justice Murphy wrote:—

"In many cases it (possibility of double punishment) may be a persuasive indication of congressional intent. But we must look at the whole case. In this case, the factors indicating exclusion of state laws are of no consequence in light of the small number of local regulations and the state's normal power to enforce safety and good-faith requirements for the use of its own highways. 'The state and federal regulations here applicable have their separate spheres of operation' *Union Brokerage Co.* v. *Jensen*, supra, 322 U.S. at 208. So far as casual occasional, or reciprocal transportation of passengers for hire is concerned (share-the-ride deals) the State may punish as it has in the present case for the *safety* and *welfare* of its inhabitants; the nation may punish for the safety and welfare of interstate commerce. There is no conflict."

Justices Frankfurter, Burton, Douglas, and Jackson dissented.

What can Minnesota do about a reactor in South Dakota that might shower a little 'fallout' on Minnesota?

How would you as a lawyer, advise the utility on these matters?

Now I, myself, doubt that any reactor builder would take the attitude of ignoring his own state government or an adjoining one, but the legal and policy questions are still unsettled. Thus there are increasing demands that the joint Committee and the Congress examine these questions and 'spell out' in the Federal Act just how far the state and local government can go in regulating the atom."

Hearings in this matter will take place before the Joint Committee in May of 1959.

"I think," concluded the Senator, on this point, "all of us agree that harmonious and non-conflicting regulations are desired at all levels of government,—Federal, state and local. The dual goals are

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[8] *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956). This was a case in which Steve Nelson, a person of the Communist persuasion, was convicted of "sedition" under Pennsylvania law. In the majority opinion, written by Chief Justice Warren, it was held that the Smith Act. 18 U. S. C. Sec. 2385 barred any prosecution of seditious persons by the States.

"Since we find that Congress has occupied the field to the exclusion of parallel state legislation, that the dominant interest of the Federal Government precludes state intervention, and that administration of State Acts would *conflict* with the operation of the federal plan, we are convinced that the decision of the Supreme Court of Pennsylvania, is unassailable."

The Pennsylvania Supreme Court had held that Nelson's trial showed only that he was acting in a seditious manner against the United States. Apparently Nelson was satisfied with the government of Pennsylvania; at least he did not seek to overthrow it by thought, word, or deed.

Reed, Burton, and Minton, JJ, felt otherwise. They opined that Pennsylvania should have the power to punish for seditious acts nominally directed against the United States.

If asked to elect between the *Zook* case, and the *Nelson* case, as a precedent for guiding the hands of the states in atomic energy legislation, we would follow the reasoning of Murphy, J. in the *Zook* case, as being more to the point. In the grand manner and as to matters of national policy, it may well be that Congress should control atomic energy. On the other hand, there has been no demonstration that Congress or the A.E.C. is either ready, willing, or able to step into the health and safety picture and rule with an iron hand. There is no conflict here. The several states should exercise their police power to protect the lives, health, and property of their citizens. If the Congress desires to have it otherwise, let it be demonstrated that the A.E.C. or some other agency, can cope with the situation in the here and now. Somebody must.

[9] G. L. (Ter. Ed.) Ch. 6, Sec. 85; and also see G. L. (Ter. Ed.) Ch. 111, Sec. 31C (Effective in 1954) which purports to give both local and state health departments the power to deal with atmospheric pollution by smoke, toxic substances, *radioactive* substances, etc.

For some information on the legislative program in other jurisdictions, see "A Forum Report—The Impact of the Peaceful Uses of Atomic Energy on State and Local Government," Atomic Industrial Forum, 3 East 54th Street, N. Y. 22, N. Y., published in January 1959; Another Forum report entitled "State Activities in Atomic Energy" was published by the A. I. F. in July 1958.

See Also: "Fire Prevention Code of the City of Boston" proposed by the Boston Fire Department in January 1959, (Boston City Record, January 12, 1959) Secs. 1.07, and 15.06. This code has not been adopted and its passage does not seem imminent.

[10] Department of Labor and Industries, Division of Industrial Safety, Industrial Bulletin No. 5, "Rules and Regulations for the Protection of the Health and Safety of Employees from Occupational Diseases Caused by IONIZING RADIATION. (Effective December 1, 1957)"

We think it of special interest to note section 14 of these regulations.

"14. PENALTY

14.1 Whoever violates any reasonable rule, regulation, order, or requirement made by the Department under authority hereof, shall be punished by a fine of not more than one hundred dollars ($100.00) for each offense. Chapter 149, Sections 13 and 180."

This penalty clause is woefully inadequate in all respects.

These regulations are based principally on the recommendations of the U. S. Dep't. of Commerce, National Bureau of Standards; see Handbook No. 59: "Permissible Dose from External Sources of Ionizing Radiation," and Handbook No. 61 "Regulation of Radiation Exposure by Legislative Means."

[11] In a press release dated 3/12/59, the A.E.C. announced that henceforth it was dedicated to the policy that the public might participate in the review of the safety aspects of publicly owned reactors, such as the one at Elk River, Minnesota. Previously the public could intervene only in the case of a privately owned reactor. The UAW did this in the PRDC case.

to protect the health and safety of the public, and at the same time to develop this new source of energy without subjecting it to unduly burdensome regulations."

MASSACHUSETTS, THERE SHE STANDS . . .

Daniel Webster

"The Lion and the Unicorn, were fighting for the crown,
The Lion beat the Unicorn all around the town.
Some gave them white bread, some gave brown;
Some gave them plum cake and drummed them out of town."

On April 1, 1959, the long heralded report of the Massachusetts Department of Public Health entitled "Regulatory and Protective Measures Pertaining to Radioactive Materials" (H. 2650); complete with legislative recommendations, that were 18 months in the making, was promulgated to a somewhat less than a waiting world.

The *Boston Herald*, a newspaper which is known to have its editorial fingertips on the political pulse of our body politic said, on Page 1.

> "The department's legislative proposals, as well as recommendations of its consulting engineers and doctors, already have brought charges of *'empire building'* from state agencies that might be subordinated to the public health department, the Herald has learned."

The "bureaucratic wrangling" mentioned by the *Herald* seems to have been most tumultuous between the DPH and the Department of Labor and Industries, which had gotten out the code already mentioned. It appeared that the Labor and Industry Group did not want their field, in radiation protection, to be "pre-empted" by the doctors and others in the DPH.

In addition DPH proposal that it be empowered to set up a "code" of regulations (an N.R.A. for Radiation?) was viewed with alarm by unidentified "state officials" who seemed to feel that they would be subordinated to the state health department, in the atomic energy field, or that the powers asked were too broad.

Unmentioned in the *Herald* was the fact that the "framers" of the present so called "model" act, (G.L. (Ter. Ed.) Ch. 6, Sec. 85, et seq.) establishing the Massachusetts Atomic Energy Commission, have made it well known that they felt this legislation was pioneering, and an approach to the problem in an intelligent way.

In a public discussion of this legislation in November, 1957 at M.I.T. it was said that the "model act" eliminated "cross-hauling" between the state and the federal government.

The philosophy of this model legislation is that if the A.E.C. granted a license to deal with special nuclear materials, the Commonwealth of Massachusetts was to step aside in awe and wonder.

One spokesman stated flatly that means were taken in drafting this legislation to "**avoid**" some of the constitutional issues. In the

course of the discussion, the term **"avoid"** was stricken out and it was left that the model act was an attempt to **"get around"** some of the constitutional problems.

This problem is really too serious to permit any "bureaucratic wrangling" and if some one does not do a bit of "empire building" the politicians will have more serious problems than taxes and pensions to consider.

The Role of the Department of Health

When the Massachusetts Atomic Energy Commission was established in 1956 (Acts, Ch. 645) the present concept of the proper roles of the State and Federal governments, and the roles of the various agencies within them, had been over-shadowed by the novelty of the thing. It must be recalled that it was only in 1954 that the lid was lifted from atomic energy to permit its "peaceful" (as opposed to military, rather than indicating serenity) application.

Even before the enactment of the Massachusetts Atomic Energy Act, the Department of Public Health was given very broad powers to deal with the regulation of methods of handling and disposing of radioactive materials. G.L. (Ter. Ed.) (Ch. 111, Sec. 5B, Acts, 1955, Ch. 335, effective May 5, 1955) authorized the DPH, after hearing, and subject to the approval of the governor and council, to establish rules and regulations "to control the transportation, storage, packaging, sale, distribution, production, and disposal of radioactive materials which may effect the public health or the health of persons exposed to radioactivity or ionizing radiation.

Sec. 5B further states that such rules shall not be inconsistent with those now or hereafter established by the National Bureau of Standards. There is a real sanction in this statute allowing fines from $100.00 to $500.00 *per day*, (after notice) for each offense. The right to injunctive relief is also granted.

It is expressly provided in 5B that the Department of Labor and Industries shall also have regulatory power to protect employees against ionizing radiation. The conflict between the two state agencies is thus apparent even from the statute.

The revision of Ch. 111, Sec. 5B recommended by the DPH eliminates the necessity for the approval of the governor and council as to the rules promulgated (with the force of law) by the DPH. In addition, there is no mention of the National Bureau of Standards, and/or the standards thereof. The new revision seems also to drop a wet blanket over the Department of Labor and Industries.

This, then, is the "empire building" alleged. The new act recommended gives DPH power to regulate **all** sources of ionizing radiation.

The report also recommends: (a) continued agency coordination in regard to radiation sources; (b) registration of all sources of ionizing radiation; (c) review of the Massachusetts Atomic Energy Act, Ch. Sec. 85 to divorce it from the health and safety field; (d) adequate staffing and training of personnel; (e) establishment of a

central laboratory; (f) enactment of legislation, as already mentioned, and also to protect state employees (who might not sue the state due to its immunity, and who might be sued also for want of a better defendant, like the operator of a "gypsy trailer"), and to give the DPH over-all control over regulations issued by any other agency, department of political subdivision; (g) establish a State service to deal with accidents or other emergencies; (h) enact legislation to keep abreast of the times; and finally (i) to seek federal aid from Congress.

A State "Radiation-Control" Agency

The recommendations of the DPH do indeed require great faith to be placed in one agency, and there should be no doubt that its powers, under the suggested plan, would be all-embracing.

It has long been felt that there should be **one** single agency in the States to deal with the radiation problem.

The proposals of the DPH appear to follow this suggested plan which is set forth in Handbook 61 "Regulation of Radiation Exposure by Legislative Means" (December 1955) issued by the National Bureau of Standards, U.S. Department of Commerce, at page 27, et seq.

The writer is of the firm opinion that there should be **one** administrative head, and that the powers should be broad. The AEC is a shining example of "too many chiefs, and not enough Indians."

In the "Report by U.S. Public Health Service on Federal State Relationships in Regulating Radiation Hazards," revision dated December 16, 1958, it was said:

> "The Public Health Service recognizes the traditional and *constitutional* relationships with regard to health protection from ionizing radiation as a part of the *health* responsibilities of *States* in the control areas, and as a cooperative venture with universities, voluntary agencies, and other Federal organizations."

The full report and a vast amount of other material on the State-Federal Problem is collected in a volume entitled: "Selected Materials on Federal-State Cooperation in the Atomic Energy Field" published by the JCAE of the 86th Congress, 1st Session, March, 1959. This report should soon be available from the Joint Committee on Atomic Energy or the Printing Office.

In conclusion of these remarks on the "empire building" etc. of the DPH, we remember the words of Dr. Frank T. Madge Department of Public Health Medical Officer for the area in the vicinity of the now late and unlamented Windscale reactor. Writing in "Lancet," November 9, 1957, Dr. Madge said, inter alia:

> "But public health authorities are becoming more and more concerned about users of radioactive materials other than in Atomic Energy Authority establishments. The Radioactive Substances Act, 1948, has not been implemented, and at the present

time the draft Factories (Ionizing Radiations) Special Regulations promise little more than an attempt to introduce some degree of internal discipline into slap-happy factories. It seems curious that the appointed factory doctors, who are often local general practitioners, should be charged with these complex technical responsibilities, while the medical officers of health for the districts containing the factories are not even mentioned. Yet any radioactive material that comes out of such industrial premises is **solely** a public-health worry, and perhaps the medical officer of health cannot be entirely absolved from an interest in his people while they are at work. Britain seems to be sleeping-in on many of these problems; it is time we woke up."

It's time we woke up too, we want workmen's compensation coverage premiums to remain reasonable; we don't want our workers injured, or to force them to resort to public generosity in the event of radiation induced incapacity. The effect of radiation on a human being is a problem of medicine, radiology, public health, and medical physics. It is not a fit subject for bickering, "bureaucratic wrangling," or one to be fought out between the lion and the unicorn on the basis that one of them is engaged in "empire building."

RADIOACTIVE REVIEW OF 1958

When the world began, we were in the age of ignorance, at some later time came the age of faith, then the age of reason, next the age of science. The pendulum has swung back again. In matters of atomic radiation (and in certain other matters) we are back to the age of ignorance again.

Some who have taken the trouble to comment on this series seem to feel that atomic radiation is a rather esoteric sort of thing with little or no personal meaning for them. To demonstrate that the atomic energy industry touches every segment of the population, the following nuclear "March of Time" for 1958 (and some of 1959) is herewith submitted:

January:

In Illinois a worker burned his thumb with a radioactive source; another worker in North Carolina burned his hand and arm in a similar accident. The furor over the English Windscale incident had not yet subsided.

February:

A child in Holland was being treated with a radium needle. In some fashion the needle broke off, unnoticed. The child went home. The alarm was sounded and under the glare of floodlights her home was turned upside down; earth from the garden was carted off and dumped at sea. Her family was taken under medical observation and all in all there was one dreadful mess of confusion. Luckily

there was no reported injury. In Colorado a worker ingested radioactive material and suffered a serious overexposure. The extent of such injury can not be determined, even now. In Ipswich, England, the town was up in arms over radioactive contamination of the beaches as a result of tidal tests. In Ohio two workers were engaged in radiography (a process similar to the X-ray of materials to determine defects, etc.) and were burned about the fingers.

March:

In California another worker engaged in radiography suffered an overexposure which was not thought serious. In Massachusetts two medical men were overexposed to radiation while giving a treatment with radio-isotopes at a hospital. In Georgia, there was much concern over the crash of an "atom plane." It is significant that this incident had international complications which included demands in England that the American bombers and their bases were a menace to the United Kingdom in general. The Russians took advantage of this for propaganda purposes. Also in England an event took place where suspected sabotage of a plane, which carried atom bombs, was uncovered. The case of Thoonen v. Commonwealth of Australia was tried at Melbourne with a verdict for the plaintiff in a substantial sum to compensate him for radiation injuries.

April:

In New York one person received an overexposure as a result of the spill of radioactive liquid, and there was an accident to the reactor known as HRE-2 at Oak Ridge, the results of which are unknown.

May:

In Illinois a train carrying radioactive material developed a "hot box" but nothing significant took place; ten persons were injured in California while engaged in radiography as a result of which there were five serious and five minor injuries due to radiation. A radioactive source was stolen from an exhibit at Ft. Leonard Wood, Missouri, to the great embarrassment of all concerned. In Canada, there was an accident at the Chalk River Reactor as a result of which the entire building housing the reactor was contaminated. Further contamination of a road took place during the clean-up operations.

June:

In Utah a workman sustained injuries to his hand while working with radioactive materials. On June 16th there was a very serious

incident at Oak Ridge during which eight men received serious overexposures to radioactive material. There was an X-ray overexposure case in Connecticut.

In England two coroner's inquiries were held to determine whether or not the deaths of two ex-servicemen were caused, as claimed by their people, by British Atom or Hydrogen bomb tests at Christmas Island in May and June of 1957. After much evidence, a Scotch verdict was given.

In Colorado a truck carrying radioactive material was wrecked but there were no known radiation injuries. At Attleboro, Massachusetts, there was a fire involving some enriched radioactive uranium. No serious consequences were noted. In California, airlines personnel were busy searching for a missing shipment of radioactive gold which later showed up minus its radioactive qualities. It had been shipped from Oak Ridge and strayed along the route.

In England, there was a fire at an "atom plant" (Calder Hall) but no radiation problem was discovered.

July:

In Boston a waterfront fire involved the premises which were occupied by a radioactive waste disposal firm. No serious or particularly dangerous incident (aside from the fire itself) was noted. In Tokyo some 51 Japanese fishermen registered their complaints of injuries due to radioactive fallout from the U.S.A.E.C. bomb tests. Diplomatic joy between the two nations was not unconfined. In Brooklyn a wayward husband, represented by able counsel, attempted to have his sentence suspended on the ground that he was dangerous to the other prisoners because he had received radioactive isotope treatments. This novel approach failed to move the court; he was carted off to serve his time. In Los Alamos, N. M., some tritium gas was inadvertently released causing concern that some overexposure had resulted to workmen.

August:

Reports were published that authorities had seized shipments of radioactive tea. Tea stocks did not suddenly rise. In New York City a box containing radioactive isotopes was lost, but later found with no known injury having occurred. The anniversaries of Nagasaki and Hiroshima were not celebrated.

September:

In New York, there were two incidents resulting in small overexposures; one involved radiation injuries to the hand of one workman.

It was in September too that an incident took place which gives us a little cause for some reflection.

"SOMEBODY MUST HAVE GOOFED"

Courtesy "Newark News"

Using a portable G-M survey meter Dr. C. R. Weinberg, Newark (N. J.) radiologist, checks an object which bore the label "Radium Poisoning. Dispose by Burial Only, U. S. Radium Corp."

"Daddy, guess what? I found something radioactive, and I'm washing my hands real good." —Russell Trunzo, Age 10

THE NEWARK INCIDENT OF SEPTEMBER 3, 1958

"Maybe your kids could have some fun with this," said a passenger to bus-driver Frank Gnatz on the afternoon of September 3rd. Bus-driver Gnatz was a curious person and examined the thing closely. When he saw the danger marking he threw it out of the bus into a vacant lot.

About 4:30 Russell (age 10) and Billy (age 6) found this attractive nuisance and began playing with it. Other children joined in. Russell went home and told his daddy he was radioactive. Billy took the thing home to his brother who called the police. A crowd

gathered (says the report) and the youngsters were ordered to wash with strong soap and await the verdict of the egg-heads. During the excitement, which lasted some four hours, a woman wheeling a baby carriage came up close with the infant to take a good look. The kids had a fine time playing "hot tag" and yelling "Now you're radioactive too."

The police called Dr. Weinberg of the Martland Medical Center in Newark, apparently about 6:00 P.M. He did not arrive until after 8:00 P.M. Said Dr. Weinberg:

> "I was caught in South Orange Ave. traffic on my way home to South Orange. When I got home, I found a message from Dr. Abraham Chmelnik, hospital director, asking me to return to the hospital because of the situation. Then I got caught in the traffic returning to the hospital."

Meanwhile, back at the scene of the "hot tag" game, the police managed to put in a call to far off New York City, PLaza 7-3600, the New York Operations Office of the A.E.C. According to the records there, the Radiation Safety Officer on duty instructed the police to:

(a) See if it were loose or open. If either, not to disturb it.

(b) If not loose or open, see if it glowed in the dark.

(c) As soon as Dr. Weinberg arrives, give him answers to *a.* and *b.* and have him make radiation measurements."

When Dr. Weinberg finally did manage to conquer the Newark traffic problem, he found the thing to be harmless.

"It was all very amusing—afterwards. But what might have been is an entirely different situation," wrote Reporter Hy Kuperstein of the Newark News, in a letter to us later.

In a communication we received in November, the A.E.C. New York office took the position that it would have been "foolish" to activate a team in such a situation and since the local officials had the matter in hand, "there was not any reason for our duty officer to go to Newark."

The most "amusing" thing of all was that Newark was well equipped to deal with this situation without all the delay and commotion that followed. Said Reporter Kuperstein in the Newark Sunday News, September 21, 1958, page 31:

> "No one thought of contacting the Police Emergency Bureau to examine the disk. The result was that almost three hours went by before calls put out by the police led to the arrival of Dr. C. Richard Weinberg, chief radiologist at Martland Medical Center, with a Geiger Counter. . . . . ."
>
> "But all along the Emergency Bureau, which has members of each shift trained to handle radiation or suspected radioactive problems, knew nothing about the situation until after the story appeared in the newspapers. Someone must have goofed one bureau member noted. . . . . ."
>
> "Over the past seven years, Emergency Bureau police have been called out 15 times either to search for radioactive items, such

as isotopes, or to determine whether suspected objects are radioactive."[12]

October:

In Massachusetts a workman sustained an overexposure to his hands while handling radioactive material and the papers carried a story of a workman at a Quincy shipyard who had a brush with radioactive material while engaged in radiography of welding.

There was a great thing in Los Angeles over the possibility that the A.E.C's Nevada tests had contaminated the drinking water, and other environment, of the City of Los Angeles. There were denials and charges and the mayor closed the windows at city hall so that the fall-out wouldn't get inside. The whole performance was a terrible performance on the part of all concerned including the A.E.C. which rose in unconvincing righteous indignation.

In Scotland a radioactive Cobalt source was stolen from an exhibit and great concern was felt that someone might be injured as a result.

November:

There was another fire at an "atom station" in England but no radiation danger was admitted. In Idaho there was a fire at a test reactor site with little information as to the dangers, if any, attendant thereon. In England a strange object was found which may

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[12] The following information was "sent to all Police Chiefs, Fire Chiefs, Directors of Public Works, and Mayors, in June 1958 by the A.E.C." according to a letter from the N. Y. Operations Office.

"AEC-RECOMMENDED INSTRUCTIONS TO LOCAL AUTHORITIES FOR DEALING WITH INCIDENTS INVOLVING RADIOACTIVE MATERIALS

If radioactive materials are involved in incidents causing their spillage or release, and if immediate actions in the involved area are necessary for the preservation of life and health, minimum contact with the radioactive materials by emergency personnel may be allowed if you observe the following precautions:

1. Notify immediately the Radiation Officer at the New York Operations Office of the Atomic Energy Commission. The telephone number is PLaza 7-3600.
2. If the incident involves wreckage and a person is believed to be alive and trapped, make every effort possible to rescue him.
3. Restrict area of accident. Keep public as far from scene as practical. Souvenir collection should be forbidden.
4. Segregate and retain those who have had possible contact with the radioactive material until they can be examined further. Obtain names and addresses of those involved.
5. Remove injured from area of accident with as little contact as possible and hold at a transfer point. Take any measures necessary to save life, but carry out as minimal first-aid and surgical procedures as possible until help is obtained from radiological team physicians or other physicians familiar with radiation medicine. Whenever recommended by a doctor, an injured individual should be removed to a hospital or office for treatment, and the doctor or hospital should be informed when there is reason to suspect that the injured individual has radioactive contamination on his body or clothing.
6. In incidents involving fire, fight fires from upwind as far as possible, keeping out of any smoke, fumes, or dust arising from the accident. Treat as fire involving toxic chemicals. Do not handle suspected material until it has been monitored and released by monitoring personnel. Segregate clothing and tools used at fire until they can be checked by radiological emergency teams.
7. In the event of a radiological incident involving a vehicle accident, detour all traffic around scene of accident. If not possible, move vehicle shortest distance necessary to clear right of way. If radioactive material is spilled, prevent passage through area unless absolutely necessary. If right of way must be cleared before AEC radiological assistance arrives, wash spillage to shoulders of right of way with minimum dispersal of wash water.
8. Do not eat, drink, or smoke in the area. Do not use food or drinking water that may have been in contact with material from the accident.
9. NO NOT try to do too much prior to the arrival of radiation specialists and physicians."

have been radioactive waste material intended to rest on the bottom of the sea. Also in England, there was an incident, not widely publicized, as a result of which some 80 workmen were placed under medical observation as a result of the suspicion that they had suffered overexposure to radiation.

In Wheeling, West Virginia, a woman was found to have been living for two years in a house in which there was a radioactive radium source. Luckily for her it was not too powerful and she fortunately hid it in the cellar for fear it would be purloined.

In Louisiana there was a fire in a military aircraft which was designated as an "atom plane"; no injuries were reported.

The death of a Yugoslavian scientist, caused by overexposure to radiation, in the Curie Foundation Hospital at Paris, about November 15, 1958 brought to light an incident at the first Yugoslavian reactor at the Boris Kidric Nuclear Energy Institute near Belgrade. As a result of the fatality, a "wave of hysteria" resulted in France. (*Nucleonics*, Dec. '58, p. 26.) It had been previously reported that the investigation had blamed the accident on "insufficiently qualified staff" in charge, and "lack of vigilance and carelessness." It was also reported that safety appliances had been removed.

This event assumes considerable importance since the procedure of "bone marrow grafts" was used. It was impossible to determine the extent of the exposure of the six scientists involved in this incident but it has been estimated by various qualified persons that it was at least 700 r. Earlier opinions would have deemed such a dose as a fatal one. More recent estimates are a little more cheerful but not much. It is now felt that 50% of a statistical group exposed to between 500-700 r, might survive, with proper treatment.

In the case of the Yugoslavian group bone marrow "shavings" were taken from volunteers and injected into the injured. Regular blood transfusions were also given. According to late reports, the marrow transplant process was not proved out since it appeared that some of the blood forming cells survived the radiation. There were definite blood changes in these patients and there will be a long period of convalescence. Further work involving radiation exposure would seem to be out of the question, under the state of present knowledge.

The latent effects to these people such as leukemia, cancer, anemia, aplastic anemia, sterility, and other dangers, are still unknown.

If the treatment given these people, the bone marrow graft, had worked, a tremendous medical milestone would have been achieved. Fortunately for them, this delicate question was not, and perhaps will not, at least in their case, be answered. The natural blood forming cells which survived will eliminate the grafted bone marrow before the success of the experiment can be demonstrated. In any event these scientists are now back behind the iron curtain.

This incident also is reported in *Nucleonics*, April, 1959, Vol. 17, No. 4, p. 106, and it is said on page 156 that the average whole body dose received by the persons involved from neutron and gamma

radiation was 683 rems. This estimate is based on official information from the "Boris Kidrich" Institute near Belgrade.

December:

There was a claim in Connecticut that an atom submarine had contaminated the water and mud of the harbor. The claim was denied. In England some radioactive material spilled while in the process of being shipped by air.

As the year came to an end, at Los Alamos, N. M., Cecil W. Kelley a laboratory technician, was performing a routine operation. He saw a blue flash. On January 1, 1959 at 3:15 A.M. he was dead. Dr. Thomas Shipman, head of the health division of the laboratory said, "for severe radiation injury of this sort, there is no specific treatment."

This incident is reported in *Nucleonics*, April, 1959, Vol. 17, No. 4, p. 107, where it is said, at p. 151, that the "investigation-review" committee of the A.E.C. "concluded that the accident was directly attributable to errors on the part of the operator who was killed. There has been some disagreement about how *strongly* the blame should be fixed."

A DAY IN COURT

At the close of his speech to the regional meeting of the A.B.A. in Pittsburgh on March 11, 1959, Senator Anderson made two suggestions as to the role of lawyers in the development of the atom. He first suggested that the bar should participate in bar association activities to study some of the legal-policy problems in this field. "These problems are not esoteric or imaginary, they are real and fascinating; they press for decisions."

The second suggestion made by Senator Anderson was this:

"Second, lawyers can carry out their traditional responsibilities by offering advice and counsel at all levels of the Government,—local, state and national. City and state governments are grappling with the new problems of how to develop and regulate the atom. As I have mentioned, new questions are also constantly emerging on the national and international levels concerning atomic development. I urge you to follow these developments and to assist those of us in Government having heavy responsibilities by giving us your advice and counsel. In most of these fields we all must play by ear and we would welcome you into the orchestra.

The scientists have led the way in unlocking the mysteries of the atom. The engineers are making realities out of the promise of atomic power. The lawyers can give it a better day in court."

It is highly probable that the atom will have its day in court before the end of 1959, and it is almost certain that the cause then in hearing will involve a radiation injury. What new and unusual legal difficulties will be encountered? What precedents are there which are in point in such a case?

For most of us who are not involved in a specialized practice, the problems of third-party liability and workmen's compensation are those which strike closest to home.

Such problems are now under discussion by Congress, by the insurance industry, and by all governmental bodies. It will be valuable for all of us to have some background in such matters for future guidance.

RADIATION INJURIES . . .

The Effects—Uncertain; The Risk—Startlingly Low!

At the request of the Joint Committee on Atomic Energy of the Congress, Dr. Shields Warren, M.D., Scientific Director of the Cancer Research Institute of the New England Deaconess Hospital at Boston, Mass., prepared a statement giving his views on the question of compensation for radiation injury.

In this report, Dr. Warren commented that while we do have some knowledge of the effects of radiation on living cells, there are still large areas of uncertainty.

"The risk from radiation under present practices is startlingly low," said Dr. Warren, and he further made a very significant point:

"The concept of a permissible level of radiation rests on a general assumption. This is that we cannot in practical daily life avoid all risks but must endeavour to regulate our activities in such a way that the risk from any given source is not unacceptably great. The degree of acceptability varies. For example, we accept tens of thousands of deaths caused by automobiles as balanced by the convenience and speed of transportation. *On the other hand, two or three deaths from smallpox would be regarded as a great threat and would lead to emergency measures for control.* Every travelling salesman expects to gain from the travel inherent in his work. On the other hand, he clearly places himself at increased risks when he undertakes this travel. . . . . Three workers have died as a result of radiation injury in the operations of the Manhattan District and the Atomic Energy Commission. Less than 50 have suffered detectable injury.[13] This is among many thousands at risk and indicates that the atomic energy industry, as now operated, is not hazardous.

"Still another aspect of the atomic industry is the knowledge that a very large scale atomic accident, while extremely unlikely to happen, could, nevertheless, be catastrophic in its effects. Consequently the relative safety of the industry for the individual has become to some extent overshadowed by the great potential risk inherent in an accident that has not occurred, and in all probability will not occur but conceivably can occur."[14]

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[13] "Detectable Injury" means that a competent radiologist, or other qualified specialist in medicine, would make a definite diagnosis of injury, and would presumably state that such injury was due to exposure to radiation. "Overexposure" and "detectable injury" are not synonymous terms. Overexposure could mean only that the established limit of exposure had been exceeded. This could result in a "detectable injury," or in an injury which was not detectable, or in no injury at all. It could also result in death.

In order of appearance the visible signs of radiation injury are (1) transient and minor blood cell changes; (2) slight blood changes; (3) possible nausea and vomiting; (4) temporary sterility; (5) damage to blood forming cells (bone marrow); epilation—loss of hair; (6) marked blood changes, severe vomiting and diarrhea; (7) death in a short time; (8) almost complete disorientation of the body and rapid expiration.

[14] 86th Congress, 1st Session, "Selected Materials on Employee Radiation Hazards and Workmen's Compensation," printed for the use of the Joint Committee on Atomic Energy.

The analogy that Dr. Warren has drawn wherein he cites the fact that two or three deaths from smallpox would call for emergency measures, while ten thousand deaths from auto accidents have become part of our way of life, serves very well to illustrate a peculiar problem in connection with injuries and deaths resulting from radiation.

There are a great many who feel that in view of the great record of safety during the past fifteen years, there is too much concern over radiation protection for the workers in the atomic energy industry, and for others involved. It appears from prior statements that very few atomic workers have been injured, and that all in all they are working in greater safety than those engaged in less exotic activities.

It is difficult to determine the exact number of persons who have been injured, or who have met death, as a result of exposure to atomic radiation. There are certainly more than the 50 reported by Dr. Warren as having suffered detectable injuries, but the difficulty is that in many cases the nature and extent of the injury is not detectable. On a worldwide basis there are many more alleged deaths from the peaceful application of radiation than the three mentioned by Dr. Warren. Not all of these are "workers" however.

Some conception of the frequency of radiation incidents may be obtained by a consideration of the fact that during the period beginning January 1, 1957 and ending September 30, 1958, records of some 43 contractors of the U.S.A.E.C., located at 52 different installations, indicate that there were 739 cases in which restrictions were imposed on employees as a result of exposure or suspected exposure to radiation. The majority of this number (474 of 718)[15] were allowed to remain at their usual jobs subject to more rigid radiation limits. 230 were temporarily detailed to other work; and the remaining 35 were permanently re-assigned to other work where they would not come into contact with radioactive materials. The restrictions were for the most part for periods of less than one month but in 29 cases, the restriction was imposed for two years or more.

Prior to January 1, 1957, there were at least 30 other cases of employee exposure to radiation; all of these resulted in lost time from work. During the same period there were at least 23 more incidents involving employees which did not result in loss of time from work. And in the period from June 1945 to August 1957 there were some 103 employee radiation incidents which did not result in an overexposure.

On the basis of the above reports it would appear that the minimum number of employee radiation incidents known since 1945 tops the 900 mark. It is to be *carefully noted* that some of the incidents included here would not be considered "radiation injuries" by a

[15] In the case of these people there were no visible signs of injury. It is to be remembered that at the present state of knowledge, it appears probable that the maximum permissible burden of radioactivity (and exposure to radioactivity) to which the body can be subjected is a cumulative proposition. In other words, a series of small overexposures causing no visible damage could (1) disqualify the employee for this type of work as time went on; and (2) possibly cause some physical injury at a later time.

physician specializing in radiation medicine. The figures are cited only to indicate employee radiation *incidents* which may or may not always result in radiation *injuries* or death.

A figure of 50 to 60 definite radiation injuries, including fatalities, from 1945 to late 1958 would seem to be a reasonable one. Only four or five definite fatalities resulting from radiation are reported.[16]

When Dr. Warren mentioned smallpox, he succeeded in likening the radiation risk to something about which we have had considerable experience. Today, a report of smallpox is viewed with grave concern.

On March 11, 1959 the London newspapers carried a report of a 21 year old medical student who was suspected of having contracted this disease. As a result of the report, 90 fellow students were innoculated, a Chinese Laundry was closed, since the patient's clothes had been sent there; 160 known contacts, the laundry staff, and residents within a 50-yard radius of his home were also vaccinated. The episode was the cause of considerable commotion and confusion despite the advice that the case was a "mild" one.

London Daily Telegraph March 11, 1959

Smallpox is greatly feared, even in the day of wonder drugs, not because of its frequency, but because of the dangers associated with one single case, and the public fear and confusion which results from one single case.

Radiation injuries, like smallpox are such as to inspire fear, above all. Sometimes this fear is unjustified, but until we have more experience, we can not hope for the intelligent understanding that must necessarily be based on proven facts.

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[16] In passing, we might mention that the Workmen's Compensation law of Massachusetts (G. L. (Ter. Ed.) Ch. 152) compares favorably with the law in effect in other jurisdictions. The areas where improvement could be made are as follows:

1. The Massachusetts law is elective for those employers who do not have three or more employees. Many instances exist where employers circumvent the law by organizing a multitude of corporations each employing one or two men. Central control of all the corporations is in the hands of one man or group. In addition, it should be fairly obvious that any workman involved in a serious radiation injury may well become a public charge.

2. Waivers are possible, in certain instances, under the Massachusetts law. This is no great problem at the moment but it could be a problem due to the cumulative and latent aspects of radiation injuries.

3. When a workman from one state is injured in another, there is a question as to which law is applicable and what coverage should be given. In Massachusetts resident workers are covered whether their injuries occur within the Commonwealth or elsewhere. Non-resident Massachusetts workers are in a dubious position.

4. The most important defect in the Massachusetts law is the provision that claims must be filed within six months after the occurrence of the injury. This statutory provision is so liberally construed as to make it virtually non-existent.

Ashley St. Clair, Counsel for Liberty Mutual, speaking at the convention of the International Association of Industrial Accident Boards in Seattle on September 9, 1958 said:—

"In my own state of Massachusetts, a worker who suffers such an injury (a radiation injury), even if it does not emerge until 20 years after exposure, is entitled to compensation benefits, including whatever medical and hospital care he may require during his lifetime."

Mr. St. Clair made the further point that there is no good reason why the law should not be amended so as to afford an adequate remedy for persons suffering from any occupational disease, radiation included.

Despite forward looking men like St. Clair, there are still a number of insurance carriers who raise the defense of lack of notice, and failure to file a claim, in many cases. Their efforts are rarely crowned with brilliant success.

5. There should be further provision made for second injury claims; perhaps the burden is one that could be shared with the taxpayers. They really have no choice; better to share the burden than to shoulder it entirely.

CALLING OF THE LIST

To demonstrate the legal situation involved in the radiation injury case, we have chosen an incident which arose out of the use of radioactive material for the purpose of detecting faults in metal. This process is known as radiography.

In industrial radiography a radioactive source such as Cobalt^{60}, Cesium^{137} or Iridium^{192} is placed on one side of the metal (or other object) and a photographic film is positioned on the opposite side. The film in a "camera" is exposed to the gamma radiation emitted from the source and when it is developed, and defects, or other significant information will be shown on the radiograph-picture. This process is not new; industrial radiography with radium has long been in use. The cost factor is the magical quantity which has brought industrial radiography into wider use. A quantity of Cobalt^{60}, which would cost about $100.00, can do the work of $20,000 worth of radium and the radiation from Cobalt^{60} will penetrate much thicker sections of steel than will the rays from radium.

The advantages of industrial radiography are (1) versatile and reliable inspection of materials; (2) inspection without dismantling the structure or assembly; (3) radioactive sources of the desired shape and size can be obtained; (4) very powerful sources can be obtained at low cost; (5) extreme flexibility and mobility of operation allowing radiography in the field under almost any condition conceivable.[17]

The result obtained is similar to that achieved by using a high voltage X-ray tube, although the character of the (gamma) radiation is quite different.

In 1958 some 53 organizations started using radioactive sources, for the specific purpose of radiography, for the first time, in the United States. Aside from the process known as "gaging" (which is employed to help produce more uniform paper, aluminum, copper, tin plate, plastics, rubber, glass, and other items, and to produce cigarettes which are all equally round, firm, fully packed, and otherwise uniform) radio-isotope applications are most frequently used by industrial organizations for the purpose of radiographic inspection. Between 1946 and 1958 some 485 industrial firms were using radioactive materials in this manner.[18]

THE ACCIDENT RECORD

There is no accurate method by which it is possible to determine the number of persons who have been injured, overexposed to radiation, or otherwise affected in some way by the use of radioactive materials for radiographic inspection.

One rather famous incident took place in Milford, Conn., on January 10, 1956 during the course of which Benjamin Zawacki, an employee, picked up an encapsulated[19] 1,600 mc. Cobalt^{60} source

[17] There is another process known as auto-radiography which allows the x-ray photography of an entire object. An electric fan can be "x-rayed" by this process to determine any defects in the design, etc.

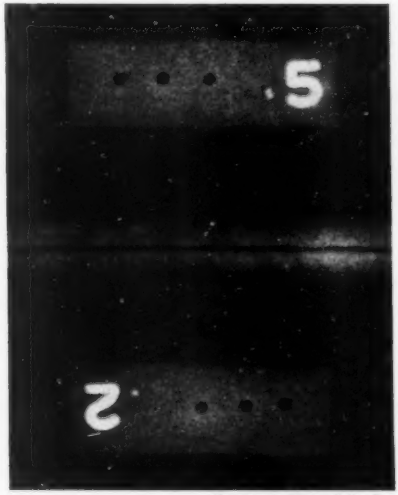
[18] "The Atomic Industry, 1958," a progress report by the Atomic Industrial Forum, page 12.

[19] See photo on page 71.

which was attached to a string and was being used on a construction job to radiograph welds. This man put the capsule in his shirt pocket and later put it in the glove compartment of his car.[20] He only had the source about his person for a short period of "several minutes."

The employee received an *estimated* dose of 22 to 26 rads (whole

RADIOGRAPH OF A STEEL WELD



Courtesy Tracerlab, Inc.

An even weld of Section "5" to Section "2" is shown here. Any Defects would appear also.

body gamma radiation)[21] and an estimated skin dose to two small areas of skin of about 3,600 r each. There were (the report says) no latent effects and no blood changes were detected. Three others in his car pool were exposed to estimated doses of less than 7 r.[22]

[20] One would think that people would not use the glove compartment of their cars for the storage of radioactive materials. On March 20, 1959, a thief drove off in Cyril W. Hooper, Jr.'s "Triumph" sportscar. The car was really "hot." In the Chicago papers the next day, and via radio and television the police warned the thief that there were two capsules of Strontium^{90} in the glove compartment. This is one of the more dangerous radioisotopes.

"I don't know how dangerous the capsules would be to someone who didn't know how to handle them," said Mr. Hooper, "but I imagine that they could burn quite badly." Cf. *Chicago Sun Times*, March 21, 1959

[21] In his action, in which he claims damages in the sum of $200,000 against the Connecticut Light and Power Company, Mr. Zawacki complains that by reason of the negligence of the defendant, its agents, servants, etc., he was permanently injured, suffered much nervous distress and worry, was obliged to undergo many medical tests, was made the subject of much publicity, and that there was a long term genetic effect on him.

[22] In his suit against the Connecticut Power Company, Mr. Zawacki alleged that these passengers threatened him with "lawsuits."

For further information on this case, see: TID-5360—Suppl., Summary of accidents and incidents involving radiation in atomic energy activities—January to December 1956, p. 12; and "Selected Materials on Employee Radiation Hazards, etc." at p. 299.

Litigation arising out of this incident is apparently still pending.

In May of 1956 at Ft. Belvoir, Virginia, some 15 to 25 employees were exposed to the gamma radiation from radioactive Iridium[192] which was being used for the radiography of welds.

The cap was knocked off the "pig" containing the 32 curie radioactive source exposing the workmen to the radiation. It was estimated that each man received only 6 r of radiation, which is not a significant amount in any case. No abnormal conditions were indicated by laboratory tests. "This incident is directly attributed to the fact that the employee failed to store the source in accordance with outlined procedure."[23]

Between March 1957 and October 1958 there are reports of at least five incidents in the United States where one or more workmen engaged in radiography were injured or affected (or possibly injured or affected) by overexposure to a radioactive source. 3 rem would be a permissible exposure.

Date	Place	Number Involved	Approximate Exposure in Rems[24]
June '57	Conn.	1	5 rem
Oct. '57	Mass.	1	47 rem
Feb. '58	Ohio	2	(a) 55 rem (b) 88 rem
Mar. '58	Calif.	1	8 rem
May '58	Calif.	10	(a) 81 rem to whole body, 3900 rem to hand (b) 26 rem to whole body (c) 34 rem to whole body, 400 rem to hand (d) 26 rem to whole body (e) to (h) 5 rem to whole body (i) 7 rem to whole body (j) 30 rem to whole body[25]

NOTE: This incident took place when radiograph source became detached and "remained in the construction area" (presumably this means it was lost) for 4 days. 10 persons were known to have been exposed and 2 held the source in their hands.

There was a rather unscientific report of an incident which took place during radiography of welding which involved "Charlie" Johnson of Quincy, Mass., sometime in 1956. Where and when, we don't know, but he "took a heavy dose of radiation from radioactive Cobalt."[26]

His film badge dosimeter showed only a small amount of radiation, but "that didn't stop the checking. A company doctor checked him once a week for a long time. The badge had been pinned to his shirt and there was no telling how big a dose his head, hands, or legs might have taken."

Charlie figures he is "one of the luckiest men alive" and said "it was a *lucky break*" that an inspector grabbed him by the leg. "It was

[23] TID-5360 (Suppl.) at page 1; and "Selected Materials" at p. 305.

[24] The "Permissible Dose from External Sources of Ionizing Radiation" including the definitions of rem, rad, etc., are contained in Handbook 59, U. S. Department of Commerce, National Bureau of Standards. This is available from the Government Printing Office for 35c. There are other handbooks covering various phases of the radiation exposure (and other) problems available from the same source at very little cost. These contain a wealth of valuable and authoritive information.

[25] The effects of a given dose of radiation (if it can be determined accurately, and this is not always the case) vary with the amount of the exposure. The immediate effects of only 25 r would be minor but some minor blood cell changes might be detected. This matter will be considered later.

[26] *Boston Traveler*, October 15, 1958, p. 6.

the Massachusetts state inspector. He had a Geiger Counter and it was clicking away."[27]

These incidents convey an idea of the risks involved in radiography, which is a minute part of the whole effort. There are countless reports of persons suspected of overexposure to radioactive "capsules" of one kind or another, but whether these "capsules" were used in radiography, we cannot always determine. The effect is the same (in a general way) regardless of the application to which the radio-isotope source is put.

RADIOGRAPH OF STEEL

Courtesy Tracerlab, Inc.

This cut shows the internal porosity of a bar of steel. The photograph was made by using a radioactive source. Defects such as this demonstrate the practical value of industrial radiography.

Thoonen v. Commonwealth of Australia

COMMONWEALTH OF AUSTRALIA

IN THE SUPREME COURT OF VICTORIA — Case No. 56/783

Between
JOHN MARTIN THOONEN
Plaintiff
—and—
THE COMMONWEALTH OF AUSTRALIA
and
THE STATE ELECTRICITY COMMISSION OF VICTORIA
and
STEWARTS & LLOYDS (AUST.) PTY. LTD.
Defendants

Before His Honour, Mr. Justice Monahan, and a Jury of Six Men, at Melbourne on Thursday, 20th March 1958, at 3:20 p.m.

MR. C. A. SWEENEY, Q.C., with MR. MURPHY (instructed by J. W. and F. GALBALLY, Solicitors) for the plaintiff.

MR. D. CAMPBELL, Q.C., with MR. RAPKE (instructed by Commonwealth Crown Solicitor) appeared for the defendants.

[27] In the interests of federal-state harmony, we will not ask whether or not the "pre-emption" by the Federal agencies, if it exists, was the reason why it was a state and not a federal inspector who grabbed Charlie's leg and rushed him off to the hospital.

Opening Remarks to the Jury[28] by Mr. Sweeney, Q.C.

Gentlemen of the jury. Originally this was an action brought against the Commonwealth, and a number of defendants. Now the Commonwealth has admitted liability. Thus the Commonwealth admits that by reason of negligence, and failure to take reasonable care, Mr. Thoonen has been injured and has suffered loss and damages.

The question for you to decide is: What injury has he suffered? *and:* What have been the consequences to him of it? *and:* What will be the probable consequences or possible consequences in the future?

The Commonwealth says it is liable for something;[29] this does not mean they are liable for everything we will claim. It is for you to decide, upon the evidence, what they should pay.

There is no claim here that the plaintiff was contributorily negligent, so you need not consider reducing an award of damages for that reason. You are simply to assess what is fair and reasonable as an award of damages.

I want to give you a picture of the whole history of this case so that you will be able to fit each witness, and each piece of evidence into the general pattern.

The plaintiff, John Martin Thoonen is now about 28 years. He arrived in Australia at the age of 21. The incident which gives rise to this case took place on December 8, 1955 at about 2:00 P.M. Mr. Thoonen was employed by Stewarts & Lloyds as a rigger. He was working at the premises of the Victoria State Electricity Commission at Yallourn.

On the date in question it happened that there came into Mr. Thoonen's possession, an innocent piece of metal about 1¼ inches long and 3/8ths of an inch in diameter. He held this in his hands for perhaps ten minutes and then he put it in his pocket. He continued with his work the rest of that day, and again on the following day, wearing the same overalls with the object in the pocket. The innocent piece of metal was situated somewhere about the middle to upper part of the thigh towards the inside.

The week-end came and went, and he returned to work, in the same overalls, on the following Monday. For the next three work-

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[28] This report is based upon the stenographic transcript of the trial and the arguments of counsel which runs about 522 legal size pages. The decision will be printed at the end of the report. In telescoping the report of the proceedings to make is available, it is inevitable that we will be unable to convey the full picture.

[29] Liability was denied in this case until the parties reached the court room door. Plaintiff's counsel felt that the denial of liability did not present any problem.

The amount of damages awarded to the plaintiff £24,500 (or $68,600) "was the highest ever made by a Judge of this State (Victoria, Australia) sitting without a jury, and has only been exceeded by jury awards on two or three occasions."

The defense appealed the decision of the trial court on the amount of damages. The appeal was later abandoned and the judgment stood.

By a process of equating the average weekly wage of the plaintiff in this case to the average weekly wage of a man in similar employment in the United States, based upon reports of the U. S. Department of Labor, we are of the opinion that the same judge, sitting in Boston, would have awarded no less than $150,000.00. What a jury might have awarded, we can only guess.

ing days, and for most of the fourth, the object remained in the pocket. As the result of an alarm the danger was made known to him at that time, but even then he had it in his hands for ten minutes more before he gave it up.

Gentlemen, it develops that this apparently innocent piece of metal was in fact one of the most terrible things that he could possibly have come into contact with. The name of it, which will probably not mean much to you, was *Caesium*.[30] It was a radioactive source which the experts will show had the strength of 2,500 millicuries.[31]

Mr. Thoonen was immediately taken to the Royal Melbourne Hospital once the terrible character of this innocent piece of metal was known.

The Immediate Effects

The first signs of injury were indicated by a small red area of irritation,[32] or erythema, on the thigh. He had some feeling of being unwell and loss of appetite; on one occasion, he vomited.

During the period while he was being held for observation, the area of erythema, instead of clearing up as in the ordinary case, gradually extended further around on his leg and up on the abdomen itself. An area of apparent deadness developed extending to the right side of the genitals. A skin slough of skin partly separated from his leg.

He was able to go home for Christmas but returned to the hospital about two weeks later and remained under observation.

As February came along he began to show signs of pain and depression. By March of 1956, he was having repeated doses of morphia for the pain, and he was very depressed. In April he was transferred to a hospital nearer home awaiting the time that the skin slough would completely separate.

During this time he was receiving changes of dressings every four hours, and other medical treatment. An infection developed in the "slough" area directly over his right femoral artery. In other

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30 Caesium or Cesium^{137} is a radioactive isotope produced by nuclear fission. Its radioactivity takes the form of gamma rays. This isotope is usually produced in powdered sulfate form (Cs_2SO_4) and is then utilized in a sealed container. The hazards associated with Cesium^{137} are similar to those of radium, although it is *not* a "bone seeker." Like Cobalt^{60}, and Iridium^{192}, Cesium^{137} is used for radiography.

31 A millicurie is one-thousandth (0.001) of a curie. 2500 millicuries is therefore equal to 2.5 curies. A curie was originally the standard for measuring the activity of one gram of radium. It is now used to indicate the activity of radioactive substances. The quantity of 3.7×10^{10} atomic disintegrations per second is known as a curie. A curie is *not* a measure of the radiations emitted by a radioactive source. The roentgen (r) is the measure of radiation. The radiation produced by the 2500 mc source in this case was estimated differently as to various parts of the body. It was said that the radiation at the point of contact was 50-60,000 r; at the hip joint 2000 r, and thru the trunk, on an average of 150 to 200 r.

If this isn't confusion, we are surprised; the dose was serious indeed, if that helps.

32 At one time doctors and scientists felt that it was alright to expose human tissue to radiation until the skin turned red. Back in 1925 the first International Commission on Radiological units and Measurements set the Maximum Permissible Dose (MPD) as an amount of radiation that caused a certain amount of erythema or skin redness. This was about 50-100 r per year. As we grew older and perhaps wiser this MPD was reduced as follows:

1934	72 r per year	
1935	36 r per year	
1947	15 r per year	0.3 r per week
1957	5 r per year	0.1 r per week

These limits apply to persons employed in activities where exposure to radiation is involved.

words, there was grave danger that this main artery running down the upper leg, would give way under the radiation injury damage and a catastrophic hemorrage would result. So great was this danger that a tennis ball wrapped in sterile dressing was at hand for use as a "plug."

He had been transferred back to the Royal Melbourne, and about June 26, 1956, it was obvious that an amputation was necessary. Preparations for this procedure were made, and minor surgery, to cut away and drain the area, was done.

On July 3, 1956 (about *eight* months after the discovery of his exposure), his leg was amputated. The best description I can give to you is that it was as if the whole of his leg had been torn out of the socket of the hip into which it normally fits; the leg is gone, there is no stump.

The skin from the buttock was wrapped around, over, and up onto the abdomen to cover over the area of skin which had been affected there by the radiation reaction. After the operation, there was some necrosis of the skin; it began to die around the edges.[33] Mr. Thoonen was feverish, and he was anemic, he had blood transfusions and was in a great deal of pain.

On August 8, 1956, he had a skin graft operation. I might tell you that the doctors will describe all these things to you when they give their evidence here.

It is also important to say that during the course of his treatment, he had a number of sternal punctures[34] which are quite unpleasant for a patient when he has it without an anaesthetic. Sometimes this does involve the use of an anaesthetic.

Now because of the site of this injury in the region of the genitals, a sperm count was carried on in order to determine whether or not he could have children in the future. It was found that he was incapable of bearing a child.[35]

In addition to this, there is some question of his enjoyment of the normal marital relations without great pain.

You might wonder whether or not Mr. Thoonen will be able to use an artificial leg to help him get around, or even for the sake of his appearance in public. You will be told that due to the peculiar nature of his injuries, Mr. Thoonen will not be able to have an artificial leg, and will be obliged to use crutches for the rest of his life. In regard to this, I might say that we must consider that unless

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[33] This allegation later gave rise to the question of whether or not "necrosis" is an infection caused phenomenon or a result of radiation.

[34] The "blood forming" cells are located in the bone marrow. Thus in order to obtain a sample of these cells, it is necessary to puncture the bone and obtain a marrow sample. This procedure is said to be something less than delightful by those who have had the experience. The additional unattractive feature of this sampling is that it is often required to obtain samples over an extended period.

[35] Sterility, both permanent and temporary, is a result of radiation. There is a sharp distinction to be drawn here because it is known that laboratory tests have proved patients sterile as a result of radiation exposure, and these patients have later produced normal children. As an element of damage, sterility could be thus viewed as temporary and thus calling for lesser damages than in the case where it was said to be permanent. In Thoonen's case, permanent sterility was claimed.

great care is taken, the pressure of the crutches can cause what is known as crutch paralysis.[36]

In addition, there seems to be little question but that further skin graft operations will be required; and in connection with these, long hospitalizations will be required.

What I have said summarizes the situation with regard to Mr. Thoonen's injuries thus far, but unfortunately, tragically really, the case does not stop there.

The Latent Effects

Exposure to radioactive material of the severity here, has a powerful influence on what Mr. Thoonen may expect in the years ahead. Quite innocently, he was exposed to a radioactive source which is usually handled with exquisite care, with severe restrictions on the time of exposure to humans.

I will not attempt to give you the whole picture that will be presented by the medical experts, but I do say that exposure to radioactive material (radiation) is a known factor capable of producing cancer.[37] We know Mr. Thoonen is permanently sterile; we also know that anyone of us has a certain risk of being over-taken by cancer. But in Thoonen's case, *his* chance of being over-taken by that dread disease, in one of its forms, has been clearly increased.

He is much more subject, for example, to leukemia,[38] which is cancer of the blood. He is much more prone to developing a malignant tumor in the pelvic area, and he is more exposed to "skin necrosis" in this area.

Even in the matter of an ordinary bump, or knock, or a fall, he faces an unusual risk. One of the effects of radiation is to reduce the ability of the cells of the body to do their healing work.[39] Particularly in the area affected, the ability of Mr. Thoonen's body to heal itself is very much reduced.

In the event of an ordinary cut or bruise, the ability of the tissue in this area to resist and recover from infection has been reduced.

I mention these things to you, gentlemen, because you might feel that your award of damages should be based upon what has happened to Mr. Thoonen up to the present. I say to you that you should not take the position that you are to make a final award on that basis but rather that you should make a final award of damages here to adequately cover this man against everything which lies ahead of him for the rest of his life.

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[36] Since crutch paralysis is not a new or unusual medical phenomena, we will not deal with it. In preparation of this report, we have attempted to give only brief attention to those aspects of the case which are already fairly well known and understood.

[37] It is generally agreed now that radiation probably is a cancer-producing substance or agent i.e., it is a carcinogen. It may also be a co-carcinogen which is an agent or substance which accelerates the cancer producing mechanism.

"Cancer" is a term used to cover a group of diseases which differ. We probably think of cancer most often as a malignant growth or an excessive multiplication of body cells which do no useful work and inhibit the normal function of the body cell structure.

[38] Leukemia (white-blood) involves the abnormal production of white blood cells (leukocytes). It seems accepted now that ionizing radiation (such as was produced in this case by the Cesium[137]) can produce leukemia.

[39] The whole picture of the radiation effect on the cells of the body is not fully understood. It is however clear that some interference with the normal self-healing process is involved. Human tissue subjected to radiation is not normal tissue, and the normal state may never be regained.

Damages

Now you will no doubt ask what we have in our minds to govern our decision as to what damages are to be awarded.

The first element is the special damage such as loss of wages, medical and hospital expense, etc. In this case you will see that those special damages do not assume great importance due to the special situation.

The second element of damages is future economic loss. Mr. Thoonen was a rigger and he had been trained as a carpenter. He will tell you about his past employment and you will decide his probable future ability to earn a living.

Then you have the element of the loss of enjoyment of life. You will need to consider the difference it has made to this young man to have undergone this ordeal, to still have ahead of him the matter of his missing leg, and other matters about which you will be told. And you should consider the fact that he can not add to his family because he is sterile.

Now in the matter of general damages, gentlemen, come all of the questions based on the comparison of John Thoonen as he was before this happened, as he has been since, and as he will be in the future.

Now as to the evidence you are about to hear . . . first you will see Mr. Thoonen and hear his evidence. Subject to His Honor's view, you will have an opportunity to see his leg and the amputation site.

You will hear of the medical treatment given to date. We will call orthopedic surgeons to tell you the condition of his leg at the present time. They will duscuss the question of his ability to use an artificial leg.

We will call highly specialized experts who will tell you of the effect on a man of this exposure to radioactive material; we will show the immediate consequences to Mr. Thoonen in this regard.

We will show you photographs of the injuries as the situation developed so far. You will have a clear picture of the immediate consequences.

But this is no ordinary case, with radioactive material, you can not say: there he is today, and he will be like that for the rest of his life, as you could in an ordinary case.

You will be told that such is the effect of this dreadful radiation upon the human body that facing him in the years ahead,—it may be eight years, it may be thirty years,[40]—are those possibilities I have mentioned.

It is better, I think, to say to you that dangers from things such as cancer or leukemia face us all. But in Mr. Thoonen's case, his danger in relation to them has been increased by the effects of this radiation. Gentlemen, that is essentially a matter on which the expert witnesses will be able to guide you.

Mr. Sweeney finished his opening statement and the court was adjourned until the following day.

[40] In the event that thirty years seems a long time, it was urged in the House of Commons in London, at the time the radiation injury statute of limitations was under consideration, that this period was not too long a time for such purpose.

The Defense Moves for a Mis-trial

When court opened on the next morning, Mr. Campbell, for the Defense, was ready with (1) a motion for a mis-trial; and (2) a Motion to Adjourn the trial for at least two months.

It was not the opening statement of Mr. Sweeney which prompted the defense to resort to these tactics. Campbell, Q.C. termed the opening statement a "model of restraint." It was the newspaper reports of the first day of trial which caused the defense such great concern. For example:

(1) "JURY TOLD OF SHOCKING INJURIES
Man, 27, Carried Horror
Capsule in his Pocket."

(2) "PHYSICAL WRECK CLAIMS
£40,000" ($112,000.00)

There were certain other "comments" in the press making reference to "terrible danger" and that "radiation has affected his (Thoonen's) powers of fatherhood."[41]

Mr. Campbell felt that some of the reports were not accurate in any event. He feared the reaction of this type of "mis-reportings" on the "lay mind."

MR. CAMPBELL: "Now Your Honor, if there ever was a case which has come before a Court of Justice which requires particular attention that no outside comments should influence a jury in connection with the claim, it is this."

. . . "The basic principle . . . is that justice should not only be done, but should appear to be done."[42]

The defense cited several English and Australian cases[43] which seem to us to have been chiefly concerned with contempt. Mr. Campbell admitted that there was no question of any contempt on the part of the plaintiff but thought that the court should do something to remedy any improper influences these reports might have had on the jury. From several thousand miles away, it looked to us like a case of bad publicity and very little more.

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[41] Mr. Campbell was anxious that the court ascertain whether or not, because of these newspaper reports, "the stream of justice" was being fouled by improper tonic. The report that Thoonen's "powers of fatherhood" were affected was not of "great weight" said Mr. Campbell; but he did think that the other reports were, in his words "cataclysmic."

[42] In our opinion, Justice was "done," and "appeared to be done" in the *Thoonen* case from beginning to end. If the conduct of the trial is any indication of the manner in which cases are tried in Melbourne, the bar of that city need bow to none. The part played in the proceeding by Mr. Justice Monahan was in keeping with the highest traditions of English and American law. And we might add that Mr. Campbell's defense was superb; his task was overwhelming. Counsel for the plaintiff tried (and prepared) his case in such a manner as to serve as a model which may be hard for most of us to achieve.

[43] At Georgetown Law School, the writer was urged to include detailed citations of cases in law review articles. We have been forced to wade thru horrible abbreviations, and citations of cases which were not relevant, ever since. Luckily, the transcript does not accurately report the citations so we feel over-joyed in omitting them. One of them involved Mrs. Gertrude Dermody of 55 Spittlesfields, Norwich, who was asked to wed a soldier in a public house. This reference is the most valuable we found in the cases cited by the defense and we feel it is really valuable indeed.

Mr. Sweeney, for the Plaintiff, opposed these maneuvers saying among other things, that if this was to be a battle of maxims: "Justice Delayed is Justice Denied." Barrister Sweeney also commented that a motion to delay the case "because some expression in a newspaper has displeased the Commonwealth of Australia is a preposterous application."

Mr. Justice Monahan noted that contempt was not the issue and that "if misleading statements about a case that is for hearing in Court are made at a time, or in circumstances when they can not be quickly and speedily corrected, it may well be that subsequently, justice can not be done because of it."

All in all, the judge concluded that by proper instructions (which he proceeded to give) the jury could be warned to decide the case on the evidence alone.

To Defense Counsel's suggestion that the Court "persuade the newspapers" not to mention the motion for the mis-trial (which obviously was heard in the jury's absence), Justice Monahan made no express order, but made it plain that he would take a dim view of any such mention by the press.

In cases of this kind, especially in the period before there is much experience by the public with the nature and effects of radiation injuries, damage claims, and litigation, it should be fairly obvious that the question of a "trial by newspaper" is almost certain to arise. This is all the more likely to be true in the United States where the latitude allowed to the press is so much greater than in England or in jurisdictions which follow the practices in effect under the decisions by appellate courts of Great Britain.

The situation would not be unlike that which arises in some notorious criminal case; the prejudice, if any, however, is liable to have an adverse effect on the defense. Publicity has helped the defense in a criminal case on many occasions, although it is usually the other way around; it could *never* help the defense in a radiation injury case.

The trial continues:

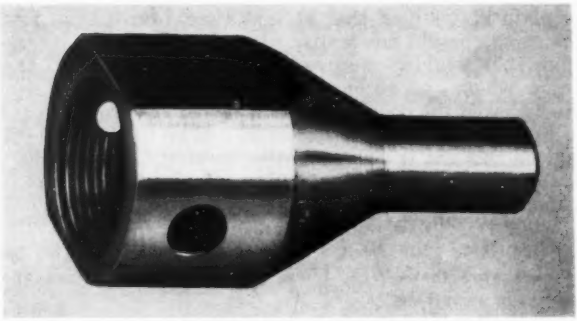
Exhibit No. 1—The Plaintiff

Mr. Sweeney requested that the jury see the body of the plaintiff, even though the foreman had said that they did not desire to do so at that particular point of the evidence. The defense did not object to this, said Mr. Sweeney.

HIS HONOR: "Well, is it now entirely a matter for the jury? If it is put that this is tantamount to an exhibit, must I not bring the jury's notice to what is exhibited and relied upon?"

Mr. Campbell suggested that if a jury declined to view an exhibit, he had never heard of their decision being over-ridden. He also mentioned that he had never heard of the body of the plaintiff being put in as an exhibit.

Justice Monahan, after some discussion, decided as a matter of



Above is a radiography source, such as is used for Cobalt[60] and other isotopes. The radioactive material is encased in such capsules for reasons of safety and in order to prevent loss of the valuable energy source.

law, that the jury was to see the plaintiff's body "for the purpose of understanding the evidence."[44]

Without any discussion by anyone, and in the presence of the judge, the jury and counsel retired to the Barrister's Robing Room to view the plaintiff's body. Upon their return to the court-room the jury advised the court that their reluctance to see the body was due to the fact that they wanted to hear the medical evidence first.[45]

Direct Examination of the Plaintiff by Mr. Murphy

Mr. Thoonen's testimony had been anticipated, to a certain extent, by the opening statement of his counsel.[46] The plaintiff said that although the sternal puncture for the bone marrow test was done under local anesthetic, it was "horrible."

In all, said the plaintiff, they made six different holes and one on each hip, on different days. My leg was getting slowly more sore and red, and after a few days, a blister developed. The blister "busted" and the area of the skin affected was increased to a size of 2½ to 3 inches in diameter. Constant changes of dressing were required and the plaintiff was not permitted to bathe once the "blister broke."

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[44] G. L. (Ter. Ed.) Ch. 234, Sec. 35 provides that the court may, upon motion, allow the jury in any civil case to view the premises or place in question or any property, matter or thing relative to the case.

Injuries are always exhibited at hearings before the "Industrial Accident Board" when the need arises.

Whether the "body" of a plaintiff is an "exhibit" we do not know.

[45] It has always impressed us that the jury is very often in mortal fear of the judge in some of our courts. In other jurisdictions under the English system, the jury often asserts its apparent function, as a fact-finding body, by asking questions, many of which are relevant. Perhaps a pointed question by the jury at a given moment might help clear the congested docket of some of the jury cases, we sometimes wonder. At least such a practice would keep the lawyers on their toes—if not on their feet.

[46] In the interest of brevity, we have omitted a repetition of the facts already stated in the opening. The testimony of the plaintiff bore out the statements made by Mr. Sweeney at the commencement of the trial.

The plaintiff testified that at that time (during the first three months or so) he did not realize what sort of danger it was. I did not know if it would stop spreading, said Thoonen, or if there was cancer, or what; and no one would give me an answer although I repeatedly asked the doctors to tell me what the trouble was.[47]

The affected area began to spread up and up the leg, and the plaintiff said he thought it was not going to stop. A little hole formed where the original redness had been, and the plaintiff was lying in bed watching this.

MR. MURPHY: "How were you feeling at this time?"

MR. THOONEN: "Oh, Well, I could not eat anything and my blood was poisoned after that—Well, I was getting down and down and I lost interest in everything."

The plaintiff told of the fact that during March of 1956 the pain was so severe, he was receiving morphia injections. The dressing of the injured area was particularly painful and this procedure was a regular one every four hours.

In April of 1956, the plaintiff was moved closer to his home, to the hospital at Yallourn. He was given penicillin injections for "boils" and the skin sloughed off his "bottom." He could not lay back in bed and it was sore to shift his body. The hole on the thigh got bigger and bigger and started "stinking" and there was no life in it anymore. The edges were "burnt." The plaintiff said he began to feel bad and ran a temperature of 103°; he had no appetite.

MR. MURPHY: "What happened then? Did you know at that stage what was going to happen to you in the future?"

MR. THOONEN: "I did not know because from the first day I came into the hospital, they told me—'another six weeks and you will be home'—so six weeks were gone and then they said:—'another six weeks or eight weeks, until the slough is all gone and we will put a skin graft over it. . . .'

"Later I heard a pair of plastic surgeons . . . talking outside the curtain and I heard them say—'Well, there is not much hope because the radiation had been going through his leg for all the time he carried it (the source) with him.'"

The plaintiff said that this was the first time he suspected what would happen. He was moved back to Melbourne in June of 1956. The plaintiff said the ride in the ambulance was horrible because every little jolt caused the pain to go through his leg. At the Royal Melbourne, Mr. Thoonen said he was told that the main artery might be affected and that the surgeons had decided to cut out all the radiation burned tissue to determine what they should do. This procedure was followed.

MR. CAMPBELL: "Well I presume that was under an anesthetic?"

MR. THOONEN: "I presume it was."

MR. MURPHY: " I hope it was."

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[47] One of the common features of a radiation injury case is the uncertainty on the part of the injured person as to his future. This is definitely an element of real damage, and it seems to be a medical fact that such anxiety can be the cause of physical and mental illness.

MR. CAMPBELL: "Well you have to tell the jury, they may think he is getting it cut out in cold blood or something."

HIS HONOR: "We shall leave that to them, shall we, Mr. Campbell?"

Following the exploratory procedure, the plaintiff said that an area was cut out of his leg about 5-6 *inches* in diameter. This hole was so big, you could put your fist in.

Later the plaintiff testified that he was told of the need to amputate and he was so weak that he could not sign his name to the authorization for the operation. Following the amputation some of the scar tissue continued to die and further surgery was done.

The plaintiff testified that he would still feel the leg after the amputation (a not uncommon phenomenon). He was in discomfort for some months and still further skin grafts and sternal punctures were done. These made the leg more painful said Thoonen. Pain continued in the leg (which was not there) said the plaintiff. (This too is not uncommon.)

HIS HONOR: "Did you have various tests to determine whether or not you were able to have children?"

MR. THOONEN: "That is right."

The plaintiff testified that since the amputation, he had been examined by a "blood specialist" for the Commonwealth of Australia, (the defendant). He took a blood test, said Mr. Thoonen.

"Never ask a question if you don't know the answer"

At this juncture, a dispute developed by the reason of the characterizations of the plaintiff that the defense doctor was a "blood specialist." The argument is interesting:

MR. CAMPBELL: "I do object to, for instance, this man (Thoonen) saying that one of the doctors was a blood specialist, or that he did a certain thing—he did a blood test or something like that."

HIS HONOR: "It only occurred to me that the plaintiff, if he was complaining that he had to endure some additional pain by reason of what these examinations involved—that would be a matter that he might ask the jury to consider."

MR. MURPHY: "Did Dr. McLean (the defense expert)—did you have any of these puncture tests you took in the hospital?"

MR. THOONEN: "That's right, he took another test."

MR. MURPHY: "What of? . . ."

MR. CAMPBELL: "Now this witness is giving medical evidence."

HIS HONOR: "Yes, he can (only) say what the doctor said."

MR. CAMPBELL: "I would prefer that he (Mr. Murphy) did not lead" (the witness).

MR. MURPHY: "Well what did Dr. McLean do to you, did he do anything at all painful?"

MR. THOONEN: "He took another marrow test."

HIS HONOR: "Well, you have got used to calling these 'marrow tests,' you could be wrong; it might be some other purpose he had in mind. You just say what he did."

MR. THOONEN: "Well, he drilled a hole through the ribs and got some marrow out."

MR. MURPHY: "Well he got something out."

MR. THOONEN: "That is right."

MR. MURPHY: "What was that like at the time? How did it feel?"

MR. THOONEN: "That feeling was just as horrible as the others."[48]

The plaintiff continued saying that he was very weak after this test by Dr. McLean. Mr. Thoonen testified that *other doctors examined him in behalf of the defendant Commonwealth of Australia.*[49]

Thoonen said that the area of the skin flap over the amputation site is still painful. Some of the area around the thigh and stomach was still painful, tender and sore. There was no skin over it (merely tissue) he said, and it is painful inside.

MR. MURPHY: "We have noticed you getting up and sitting down again (in the courtroom). What do you do that for?"

MR. THOONEN: "Well, because I have not got much place (to sit on) and I get sore in my leg and after a while it is not good to my bottom if I sit down too long because there, the bone sticks out in a point (the ischial protuberance) and when I am sitting down long on it, it goes through the skin."[50]

The plaintiff testified that he had tried to wear an artificial leg in April 1957 but my surgeon told me I would not be able to wear it. It was made in England for me but in a half hour, I had "gone through the skin graft" and Dr. Syme told me not to wear it.

MR. CAMPBELL: "Well, I object to that."

HIS HONOR: "Well, that objection . . . "

MR. MURPHY: "After it 'went through the skin graft' you have not worn it since?"

MR. THOONEN: "No, sir, it is in the Royal Melbourne Hospital."

The plaintiff further testified that he has been moving about on crutches but has developed callouses on the palm of his hand. The use of the crutches causes pressure on his arm, said Mr. Thoonen, and he slipped three times and fell once. The fall resulted in a shock.

On the occasion of the fall, said the plaintiff, I went inside and lay down until I quieted. That night I noticed a little "bump" (this was a sort of hernia) on the skin graft which grew in size; I still have it. Mr. Thoonen described the effect of the motion of his body which caused pain when the skin graft was stretched.

I was married in 1950, said the plaintiff, and we have three girls, all born before the accident. I did intend to increase my family. I have had marital relations with my wife but pain is the result.

MR. MURPHY: "What do you intend to do in relation to your future?"

MR. THOONEN: "I do not know what I can do sir, but I have got to care for my wife and kiddies. I have tried several things, but, well, some

[48] Whether or not it was a bone marrow test or something else, it didn't matter. Mr. Campbell found out it was horrible.

[49] The signifiance of this fact is that the defense decided that it would be better if it produced *no* witnesses. This of course opens the door to a comment by the plaintiff that if there was better evidence to contradict, it should have been produced as there was every opportunity to introduce it by the defense.

[50] When Mr. Thoonen said "it goes through the skin" he apparently meant that this was the sensation. In addition, the area was covered with scar tissue not what we think of as normal "skin." This terminology caused considerable confusion during the trial.

things will go a bit, which were not really in my line, but still it took me a long time to use the (carpenter's) plane; I have done that. But I am not able to push the plane any more standing on one leg."

The plaintiff testified that in attempting to do carpentry, he had to be most careful to avoid injury. He stated that he had been totally unemployed since the date of the incident in December 1956. Mr. Thoonen related one incident of "do-it-yourself" work at home which he failed to complete because of his condition.

The plaintiff also stated that the Rehabilitation Center of the Commonwealth of Australia Social Services had not helped him although he had made application there.

Cross-Examination by the Defense

MR. CAMPBELL: "Apart from the very serious disability of the loss of your leg, the state of your health is quite good, is it not?"

MR. THOONEN: "It is not bad."

It was the strategy of Mr. Campbell, in cross examining Mr. Thoonen to attempt to show that he was not permanently and totally disabled. Defense counsel suggested to the plaintiff that he might take a job which called for bench work. Mr. Thoonen indicated that he had no training but that he would like to obtain employment. The question of sitting on a foam rubber cushion was discussed but the plaintiff testified that this would not allow him to sit for a regular work day because of the peculiar nature of his injuries.

Mr. Campbell inquired as to the use of the artificial leg which was a so called "tilt-table" leg. The plaintiff testified on cross-examination that he was troubled with the material of the artificial leg rubbing against the skin graft and was forced to give it up.

Defense counsel was apparently attempting to suggest that many persons with artificial legs were getting about and doing a day's work. He inquired of the plaintiff as to whether or not he had been advised to give the artificial leg a fair try. Mr. Campbell asked the plaintiff whether or not the prosthetic expert who fitted the leg had informed him of the need to persevere in getting used to the thing. The plaintiff admitted such was the case.

MR. CAMPBELL: "And he told you that it was essential that you should persist with it, did he not?"[51]

MR. THOONEN: "That is right."

MR. CAMPBELL: "What is the longest time, at any one time, or number of days, that you have attempted to persist with using this leg?"

MR. THOONEN: "The longest time has been about 20 MINUTES, that is when the skin busted."

MR. CAMPBELL: "We will not bother about the skin. . . ."

MR. SWEENEY: "I would like the witness' answer be not interrupted."

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[51] In a "normal" case, where there was no radiation damage it would seem that Mr. Campbell's line of inquiry was well conceived. In this case, it led to considerable trouble for him.

HIS HONOR: "I suppose, Mr. Sweeney, strictly speaking, Mr. Campbell is in charge of this, and he only asked the longest time, not the reason why."

A brief discussion followed during which Mr. Sweeney (who seems to have met defense counsel Campbell in other trials) stressed his point. Mr. Campbell was outraged and the usual verbal fireworks resulted.

After recess for lunch, Mr. Campbell continued his cross-examination with a suggestion that perhaps Mr. Thoonen might use the fore-arm type of crutch ("French-Crutches," so called) to eliminate the callouses and "crutch paralysis" which resulted from using the conventional "under-arm" type.

The plaintiff said that he had not been advised to use "French" crutches, and did not himself know if they would be better in his case.

Re-Direct Examination by Mr. Murphy

The only significant point developed on re-direct examination was that the plaintiff gave up using the artificial leg after twenty minutes as a result of "medical advice." It was also brought out that the rehabilitation agency of the Commonwealth of Australia had given him a "Don't call us, we'll call you" answer to his request for assistance. Nothing had been heard from them for a year.

THE MEDICAL EVIDENCE

The plaintiff called the following medical witnesses (one being actually a physicist) in his behalf:

DR. LEO ROZNER (Physician), Staff Physician, Royal Melbourne Hospital, Melbourne, Australia.

DR. GEORGE R. A. SYME (General Surgeon), Surgeon; Bachelor of Medicine,[52] Bachelor of Surgery, Melbourne Univ.; Fellow of Royal College of Surgeons, in England and its counterpart in Australia; Honorary In-patient Surgeon, Royal Melbourne Hospital; in practice 30 years as a surgeon.

DR. JOHN B. COLQUHOUN (Orthopedic Surgeon), Surgeon; Bachelor of Medicine, and Bachelor of Surgery, Fellow of Royal College of Surgeons in Edinburgh, and Royal Australian College of Surgeons; in practice as an orthopedic surgeon in Australia for 28 years.

JOHN H. MARTIN, Ph.D. (Health Physicist), Bachelor of Science, Doctor of Philosophy, Fellow of the Institute of Physics, and Head of the Physics Department of the Cancer Institute at Melbourne.

DR. DAVID C. COWLING (Pathologist), Physician and clinical pathologist at the Royal Melbourne Hospital.

DR. KEITH D. FARELY (Physician), Bachelor of Medicine; Bachelor of Surgery; Fellow, Royal College of Physicians (London) and its counter-

[52] All of these experts (except Mr. Martin, who was a physicist) were qualified medical practitioners. The educational background and training differs somewhat from the customary M.D. degree we see in the United States.

part in Australia; Senior Honorary In-Patient Physician at Royal Melbourne Hospital.

DR. JAMES P. MADDIGAN (Radiologist), Doctor of Medicine; Member of Royal Australian College of Physicians; Bachelor of Medicine and Bachelor of Surgery. Member of the College of Radiologists of Australia, diplomate in therapeutic radiology. Specialist in radio-therapy; consultant to the cancer institute; Honorary radiotherapist at St. Vincent's Hospital in Melbourne.

DR. HENDRIK A. S. VANDEN BRENK (Radiologist), Bachelor of Medicine, Bachelor of Surgery; Research Officer and Consultant Radio-therapist at the Cancer Institute in Melbourne; Master of Surgery, Fellow, Royal College of Surgeons, Diplomate in Therapeutic Radiology, Member Australian College of Radiologists.

This is indeed an imposing array of experts and as will be seen, all were needed. The "Cancer Institute" listed as an affiliation by some of the above named is presumably the Hall Institute of Medical Research at Melbourne, Australia. In May 26, 1958, Sir MacFarlane Burnett, Director of this institute was invited to give the "Cutter Lecture" on Preventive Medicine at the Harvard School of Public Health.[53] This honor is some indication of the value of the work not only of Dr. Burnett, but of his institute as well. One of the counsel in the *Thoonen* case has written us to the effect that the medical witnesses were true and qualified specialists in the field of radiation medicine (or otherwise, as indicated). He felt that there is a very real danger that the opinions of otherwise highly qualified medical experts might not do justice to a radiation victim. The medical experts *must* in such cases include truly expert radiologists and others who deal with radiation. Without these the trial is pure sham, we have them here.

The cause now in hearing is hereby "adjourned" until our JULY issue. We particularly invite your comments on this trial report and the features of it which we might particularly stress. *J. B. M.*

FRANCE CRACKS DOWN ON TRIAL BY NEWSPAPERS AND LAW ENFORCEMENT "LEAKS"

Following the emphatic comments of former District Attorney Moynahan and Paul T. Smith at the Holyoke Meeting on the much discussed law enforcement "leaks" and unfair newspaper headlines and news columns about criminal cases, the recent action in France is of special interest.

The London Daily Telegraph for March 2, 1959 contained the following news report from its Paris correspondent.

THE NEWS REPORT

"Press freedom to report on judicial proceedings in France is threatened by a code of penal procedure which comes into force tomorrow, 3-9-59, making changes more radical than any since Napoleonic times, it insists that all criminal cases should be prepared in secret.

"The police, magistrates and lawyers are forbidden to reveal details to any third party. Hitherto, while there has never been any equivalent in France of the British magistrate's court hearing, in fact information about proceedings before the magistrate has always been readily available.

"Magistrates and police were only too willing to talk about their work. But from tomorrow police or court officials 'leaking' information are threatened with prosecution and punishment. In spite of protests, the Government has ordered the Press provisions to be rigorously carried out.

"The code allows the public prosecutor or magistrate to make written statements to the Press, but only to avoid publication of 'misleading news.' "

MATTERS FOR THE ANNUAL MEETING

A PROPOSAL TO INCREASE THE ANNUAL DUES OF THE MASSACHUSETTS BAR ASSOCIATION

Section 2 of Article XVIII of the By-Laws provides:

"Any matters comprehended within the purposes of this Association or affecting the Bar of Massachusetts may be brought before the annual meeting for action or for an expression of the sense of the meeting. But no vote shall bind the officers, or the Association as a whole, nor purport to do so, unless the subject matter incorporated in such vote was first included in the notice of the meeting in a form reasonably sufficient to indicate to the members the matter to be considered. Any member desiring to have any matter presented to the Association shall not later than May 1st submit the same in writing to the Secretary in brief form reasonably satisfactory for inclusion in the notice of the Annual Meeting to the members."

The Secretary has received from a member of the Association the following proposal to be presented to the annual meeting of the Association at Plymouth on June 13, 1959.

Proposal for Consideration

RESOLVED that the by-laws of the Massachusetts Bar Association be amended by striking out in Article XVI, Section 1 "$12.00" and inserting in place thereof "$25.00."

REPORT OF NOMINATING COMMITTEE

The committee herewith submits its nomination for officers and members at large of the Board of Delegates of the Massachusetts Bar Association to fill vacancies that will exist at the annual meeting to be held in June of 1959.

PRESIDENT

GERALD P. WALSH, New Bedford

VICE-PRESIDENTS

LINCOLN S. CAIN, Pittsfield
BERTHA R. KIERNAN, Chelsea
JAMES H. FITZGERALD, Brockton
STANLEY B. MILTON, Worcester
HAROLD HORVITZ, Cambridge

TREASURER

MILTON J. DONOVAN, Springfield

SECRETARY

FRANK W. GRINNELL, Boston

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SUMNER H. BABCOCK, Wellesley
FRANK GOLDMAN, Lowell
MICHAEL CARCHIA, Belmont
HENRY R. MAYO, JR., Lynn
REV. ROBERT F. DRINAN, S.J., Boston
ALVERTUS D. MORSE, Northampton
PHILIP R. SISK, Lynn

Respectfully submitted,

ROBERT W. BODFISH
RICHARD B. JOHNSON
BERTHA R. KIERNAN
SAMUEL P. SEARS
THOMAS M. A. HIGGINS, *Chairman*

A FORGOTTEN MAN

(From the Boston Herald of April 6, 1959)

To the Editor of the Herald:

To those of us of his generation who knew him, the late Joseph Wiggin, a former President of the Massachusetts Bar Association, is not forgotten, but is well remembered as one of the most honorable, competent, careful, respected and responsible members of the bar of Massachusetts, but from the press reports of the somewhat extraordinary hearing in regard to Sacco and Vanzetti, both his existence and his importance appear to have been forgotten or unknown.

I have no desire to discuss the case. I lived through it and have respected friends on both sides of the controversy, but, in the midst of all the excessive abuse heaped upon all the respected representatives of the government, I think one fact should be known and not forgotten. In the Herald press report of April 3rd one speaker was quoted as saying, "One can almost feel sorry for Gov. Fuller because there was thrust upon him a burden for which he was not equipped. With his limited qualifications he did the best he could and the best was deplorable."

The forgotten, or unknown, fact is that the Governor had, as his personal counsel, Joseph Wiggin, with his moral and professional responsibility as an advisor during the independent investigation which they both made, in meeting the Governor's heavy responsibility as chief magistrate of the Commonwealth before he made his decision. This investigation was independent of that of the Special Commission. I think this fact should be known and considered.

One more suggestion—I am somewhat puzzled to understand what a "posthumous pardon" is or can be. I had supposed that an appeal for "posthumous" justice was within the exclusive jurisdiction of the Almighty whose judgment is generally considered to be both informed and trustworthy. Am I mistaken?

FRANK W. GRINNELL

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